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United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF JACOB YUNG-
BLUTH and AUGUST W. SCHAFER,
co-partners doing business under the
firm name and style of Bank of Hamil-
ton, Jacob Yungbluth & Co. Proprietors,
and Bank of Hamilton, A. W. Schafer
& Company, Proprietors; and A. W.
Schafer & Company, Private Bank;
Jacob Yungbluth and A. W. Schafer,
Bankrupts,

No. 3625.

TRANSCRIPT OF RECORD

Upon Appeal from the United States District Court
for the Western District of Washington
Northern Division
and upon
Petition for Revision.

No.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

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BLUTH and AUGUST W. SCHAFER,
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James

876

897

(TITLE OF COURT AND CAUSE)

NAMES AND ADDRESSES OF COUNSEL.

E. C. MILLION and GEORGE FRIEND,
Attorneys for Bankrupt, 1203 Hoge Building, Seattle,
Washington.

PAUL W. HOUSER,
Attorney for Bankrupt, Renton, Washington.

I. E. SHRAUGER,
Attorney for Bankrupt, Mt. Vernon, Washington.

L. S. HADLEY,
Attorney for Trustee, Bellingham, Washington.

A. M. HADLEY,
Attorney for Trustee, Bellingham, Washington.

W. H. ABBOTT,
Attorney for Trustee, Bellingham, Washington.

J. W. ROMAINE,
Attorney for Objecting Creditor, Bellingham, Wash-
ington.

C. E. ABRAMS,
Attorney for Objecting Creditor, Bellingham, Wash-
ington.

(TITLE OF COURT AND CAUSE)

BE IT REMEMBERED that on, to-wit: the day of, 1913, the above entitled matter came on for hearing before the Honorable Edward E. Cushman, Judge of the District Court, in the above entitled matter, holding court at Seattle, Washington, at which time the trustee appeared by his attorneys Hadley, Hadley & Abbott, and the bankrupt, Jacob Yungbluth, appearing by his attorney, E. C. Million; and this matter coming on for hearing upon the petition of the bankrupt for review of the decision of the referee herein, the material facts appearing from the record, being as follows:

The petition for adjudication was filed herein on the 21st day of January, 1908, and thereafter the bankrupt herein, Jacob Yungbluth, appeared by his attorneys and contested said petition, which ultimately resulted in a decree of adjudication, and thereafter, and in due and regular course of proceedings and on the 13th day of November, 1911, said bankrupt filed his schedule of property and claim of exemption, and among other things claimed Lots 13, 14, 15 and 16, Block 15 of Hamilton Townsite Company's Second Addition to the Town of Hamilton, Skagit County, Washington, as a homestead and as exempt under the laws of the State of Washington.

That thereafter said Trustee set aside said property as exempt, but that in due course of time certain creditors filed objections to the allowance of the exemptions, and which said objections upon due consideration by the Referee were denied and the said exemptions allowed, and the only question in controversy here is the order of the referee as to the homestead property, which order was and is as follows:

"The referee finds as a fact from all the evidence on said hearing that the sum of \$500.00, evidenced by the bankrupt's promissory note dated in 1907, was borrowed from the Bank of Hamilton, of which the bankrupt was a co-partner, and was and constituted a fraud against the creditors of said bank as well as against the creditors of the bankrupt, Jacob Yung-

bluth; and was and constituted a part of the purchase price of the lots and property occupied by the bankrupt and now claimed as a homestead exemption; and that said homestead property should be charged with the amount due on said note, including interest thereon from the date of said note at the rate therein specified and if no rate is specified for interest in said note, then the legal rate of interest from the date of said note to this date.”

“The referee finds that said sum of \$500.00, with interest as aforesaid, should be offset against said homestead and if not paid, then, an order should be made authorizing and directing the trustee to sell said homestead property and out of the proceeds from such sale pay said note and interest and pay to the bankrupt the remaining proceeds of such sale.”

From that portion of the decision of the referee above mentioned the bankrupt has petitioned for revision and the referee has sent up with his return certain testimony of which the following is all that has any bearing upon the question at issue, to-wit:

Wilbra Colman was called as a witness on behalf of the creditors, and testified as follows:

“Live at Sedro Woolley and am an attorney at law and have intimate knowledge of the affairs of the bank of Hamilton, and was receiver of the same, appointed by the State Court on November 5, 1907. That the books of the bank were burned up on January 9, 1909, and that prior to the burning I made a thorough and exhaustive examination of the books.”

also, as follows:

Q (by Mr. Hadley) Calling your attention to the transaction of the purchase of Lots 12, 13, 14 and 15, of Block 15, of Hamilton Townsite Company's Second Addition to the Town of Hamilton, Skagit County, Washington, I will ask you if you discovered anything from these books regarding that Sylvester property in Hamilton?

A I know any record of the purchase of the Sylvester property that the books showed.

Q Can you state what the books showed with reference to that transaction?

A On June 10, 1905, Yungbluth presented a check that was paid on the Bank of Hamilton to Sylvester for \$600.00 and at the same time gave his note to the bank of Hamilton, being bills receivable 674, for \$600.00, and that prior to that time Mr. Yungbluth had given to Sylvester a check of \$100.00, making a total amount of \$1300.00.

Q At what time, Mr. Coleman?

A June 10, 1905. Mr. Yungbluth had a remnant of a deposit of \$1150.00. He checked against that account for \$600.00 to pay Sylvester and borrowed \$600.00 in addition to that, at any rate there was drafts or securities from the bank that was given to Sylvester for that amount at that time. And then prior to that time there was another check for \$100.00 to Sylvester, making \$1300.00 between the 25th of January, 1905, and the 10th day of June, 1905.

Q From your examination of the books and accounts of that bank are you able to state of what that deposit of \$1150.00 consisted?

A I am.

Q State?

A On January 19, 1905, Mr. Yungbluth's over-draft consisted of \$1633.67 and Mr. Schafer's over-draft was \$2800.00 and some odd dollars. The books were not balanced between the 19th day of January and the 27th day of January. On the 25th of January, Mr. Yungbluth transferred to Mr. Schafer the property known as the Hamilton Bank Building, and also made a bill of sale of what is known as the bank fixtures. The real estate account of the bank was charged \$3200.00 on account of the Hamilton Bank Building, and also charged \$2100.00 on account of the Hamilton Hotel property. The real estate account was credited with \$700.00 a deduction on vacant lot that had been carried prior to that time on

the books of the bank at \$1200.00. There was also charged to the furniture account \$433.67, there was also charged to the chattel property account \$660.00 and some odd cents, there was also credited to what was known as tax title property 1, which was the same property as Hamilton Hotel property the sum of \$1410.00 prior to that time tax title property had included not only the real estate but also personal property of the Hamilton Hotel.

Q Tax Title Property 1 as carried on the books was the Hamilton Hotel property?

A Yes.

Q Tax Title Property 2 was the Lodge property, and was credited with \$50.00. Schafer's overdraft was credited.

A \$1600.00 and Mr. Yungbluth's over-draft was wiped out. Yungbluth when the transaction was through received a credit on the books of \$950.00, and Yungbluth had taken out of the assets of the bank prior to that time on Lodge property and had against him a debit of \$340.00, but which said debit on the books against the property being deduced by rents \$50.50, which said property was charged off the books and accounts to Mr. Yungbluth. Then about March, 1905, Mr. Yungbluth was credited on the books of the bank again with \$200.00, for a certain gas machine, that was charged in chattel property account, which was the second gas machine.

Q And that is the method in which the deposit was made up, out of which you say he drew \$600.00 to pay Sylvester?

A That was the nature of the transaction in regard to the matter. The bank property and bank building was put on the books at \$3200.00 out of which \$1200.00 was credited to the account of Mr. Yungbluth and \$1000.00 to the account of Mr. Schafer.

Q That title stood in whose name?

A Mr. Schafer's.

Q Schafer was the active manager of the bank?

A He called himself cashier.

Q Did the books of the bank disclose any further transaction with reference to this Sylvester deal?

A Yes, I think it was the 22nd day of June, 1905, the \$600.00 note was paid by a check or draft from the First National Bank of Mount Vernon. Then some time after that in 1907 the Bank of Hamilton paid the Mount Vernon bank \$500.00 and Mr. Yungbluth gave his note to the Hamilton Bank for \$500.00, and that \$500.00 note was turned over by me to the Trustee.

Q The net result of those transactions as shown by the books of the bank was all the money which was invested in the Sylvester property was with drafts from the Bank of Hamilton?

A It was.

EXAMINATION BY MR. MILLION

Q It was charged though to Mr. Yungbluth on the bank books wasn't it?

A It was charged to his account.

MR. ROMAINÉ:

Q. The result of the transaction was that he had \$900.00 credited to him on the books, that being in excess of the \$1600.00 over-draft?

A Yes.

Q That would change his account, how much?

A It amounted to \$2583.67.

MR. MILLION:

Q. On that same day Mr. Yungbluth gave a deed to Mr. Schafer?

A He did.

Q For the bank property?

A Yes sir.

Q And for Lot 1, Block 8, Cumberland Addition?

A I would not be positive as to that.

Q Also Lots 1, 2 and 3, Block 1, being Hamilton Hotel property?

A I think so, I am not positive.

Q The books showed this transfer?

A The books showed this and that is that tax title No. 1, which was the Hamilton Hotel property was credited with and the real estate was charged with \$2100.00 Hamilton Hotel property, and chattel property account was charged with \$660.00 and some cents.

Q Do you know the date of the note of \$500.00 now held by the trustee that was given by Mr. Yungbluth?

A 1907, I do not remember the date.

Q That was before the bank closed?

A It was a short time before that.

Q And that note was a renewal of a prior note?

A It is my recollection that it was.

Q The books of the bank contained an account known as real estate account?

A They did.

Q Did this account show the various items of real estate which were assets of the bank?

A By tracing through from the changes in the balance book to the journal you could get it.

Q Was the Sylvester property now claimed as a home-
stead ever shown on the books of the bank as a part of the
assets of the bank?

A It was not.

EXAMINATION BY MR. ROMAINÉ

Q Did Mr. Yungbluth make any deposit in the bank from January until June 1905?

A None, except two. The \$950.00 item that made the balance of the transaction and this under date of January 5, 1905, and the \$200.00 item under date of March 1905, that was credited to him and charged to the chattel property account.

Q It showed no deposit of cash?

A Not at that time or for a long time after that.

MR. MILLION

Q When you were receiver you made a report as to what the books showed as the real estate assets of the bank?

A I did.

Q That did not include the Sylvester property?

A No, it didn't.

Q The report only showed the Schaffer property?

A The report only showed what the books showed and what I found out outside of that.

Mr. Yungbluth was called and testified as follows:

MR. MILLION:

Q What did you give Mrs. Sylvester for your homestead?

A \$1300.00.

Q Where did you get the money?

A August advanced me \$600.00 out of the bank. I gave my note for it and the rest I got in the Mount Vernon bank in June.

Q Did you get anything as the price of the piano?

A I got \$180.00 and turned it to Schaffer on that note.

Q You borrowed \$600.00 from Schaffer and \$600.00 from the Mount Vernon bank and where did you get the \$100.00 which you paid Mrs. Sylvester?

A Mrs. Sylvester was owing me \$100.00.

EXAMINATION BY MR. HADLEY

Q I want to go back to the purchase of the Sylvester property. You say when you bought that property August let you have \$600.00, where did you get the other \$600.00?

A From the Mount Vernon bank.

Q When was that?

A On June 22.

Q When did you buy the property?

A June 10th.

Q Did you pay Sylvester in full at the time you bought it?

A No, I didn't pay him in full until I got the \$600.00 from the Mount Vernon bank. I paid \$600.00 then and \$600.00 on the 22nd, then afterwards the bank paid the Mount Vernon bank back. I sold Norton property for \$800.00 and put that money in Schaffer's bank.

Q When was that?

A Probably nearly one year after.

Q You got the money for six months and then got it again for another six months?

A Between that time I sold that property and paid it off.

Q Did you pay the Mount Vernon bank that note?

A Yes, I paid it myself. I went to the bank myself. I think I did I am not positive, I cannot swear to it. I went to Mount Vernon myself.

Q Then why did you give August's bank a note for \$500.00?

A Security.

Q Security for what?

A Security for \$600.00 which I borrowed from the bank.

Q Didn't you pay the \$600.00 to Mr. Sylvester out of the money in the bank at the time of the purchase. Wasn't \$600.00 charged to your account at that time as having been paid to Mr. Sylvester?

A Oh, I tell you, that note was afterwards.

Q Is it not a fact Mr. Yungbluth when you bought the Sylvester property you gave a check on the Bank of Hamilton for \$600.00 and you borrowed \$600.00 more from the bank and paid for the property, and then you went to Mount Vernon and borrowed \$600.00 and paid the bank of Hamilton?

A Yes.

Q Then the Mount Vernon bank's note was carried for six months and you paid \$100.00 on it and renewed it for \$500.00?

A I do not think so.

Q Well at any rate you renewed the note and then the Mount Vernon bank was paid for by a check from the bank of Hamilton?

A Yes sir.

Upon due consideration the court confirmed the decision of the referee. This matter coming on for the settlement of the foregoing bill of exceptions offered by the bankrupt and it appearing that the trustee has had due notice of the application to settle the same and that all amendments proposed by the trustee have been embodied in the proposed bill and the trustee not appearing and there being no objections to its settlement it is hereby settled and allowed as above set out.

Dated April 2, 1914, at Tacoma.

EDWARD E. CUSHMAN, Judge.

Endorsed. Filed April 3, 1914.

(TITLE OF COURT AND CAUSE)

ORDER CONFIRMING REFEREE

This cause coming on regularly for hearing on this 2nd day of April, 1914, upon the petition of Jacob Yungbluth for a review of the decision of the referee establishing certain charges against the homestead of the said bankrupt. The bankrupt appearing by his attorney, E. C. Million, and the trustee appearing by his attorneys, Hadley, Hadley & Abbott, and certain objecting creditors by their attorney, J. W. Romaine, and this matter having been duly considered and the court being fully advised in the premises, it is here and now ordered, adjudged and decreed that the said order of the referee be and the same is hereby confirmed, to which ruling and decision the said bankrupt excepts and his exception is allowed, and the said bankrupt thereupon gives notice in open court that he hereby appeals from this decision to the Circuit Court of Appeals, and the said appeal is hereby allowed upon said bankrupt filing a bond in the sum of \$200.00 conditioned that he will prosecute said appeal and answer in damages and costs if he fail to make his appeal good, and at this time the said bankrupt having presented to the court such a bond executed by Surety Company to the court's satisfaction, the said bond is hereby approved and the said appeal allowed.

Done in open Court this 2nd day of April, 1914.

Enter: EDWARD E. CUSHMAN, Judge.

Endorsed: Filed this 3rd day of April, A. D. 1914.

(TITLE OF COURT AND CAUSE)

ASSIGNMENT OF ERRORS

Comes now the bankrupt and makes the following assignment of errors, to-wit:

I.

The court erred in holding that the \$500.00 evidenced by the note now held by the trustee was borrowed from the bank and constituted a fraud on the creditors.

II.

The court erred in holding that the homestead should be subjected to a lien of \$500.00 and interest as represented by said note.

Wherefore the bankrupt prays that said decision be reversed.

MILLION & HOUSER,

Attorneys for Bankrupt, Jacob Yungbluth.

Endorsed: Filed April 3rd, 1914.

(TITLE OF COURT AND CAUSE)

APPEAL BOND

Know all men by these presents: That we, Jacob Yungbluth, as principal, and the United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of surety in the State of Washington as surety, are held and firmly bound unto the United States of America, in the just and full sum of Two Hundred and no/100 (\$200.00) Dollars, good and lawful money of the United

States of America, well and truly to be paid, and for the true payment of which we hereby bind ourselves and our and each of our heirs, executors, administrators and successors, jointly, severally and firmly by these presents.

Witness our hands and seals this 2nd day of April, A. D. 1914.

The condition of the above obligation is such, that,

Whereas the above named Jacob Yungbluth has given notice of his intention to appeal from an order of the referee entered in the above entitled matter, establishing certain charges against the homestead of said Jacob Yungbluth, which said appeal has been allowed upon the condition that said Jacob Yungbluth shall file a bond in the sum of Two Hundred Dollars conditioned that he will prosecute said appeal and answer in damages and cash if he fails to make his appeal good.

Now if the said principal Jacob Yungbluth shall prosecute said appeal and shall pay all costs and damages that may be awarded gainst him on the appeal, or on the dismissal thereof not exceeding the sum of Two Hundred and no/100 (\$200.00) Dollars, then this obligation shall become null and void; otherwise it shall be and remain in full force and effect.

JACOB YUNGBLUTH,

UNITED STATES FIDELITY & GUARANTY CO,

By JOHN C. McCOLLISTER,

Attorney in Fact.

(Seal)

Approved: EDWARD E. CUSHMAN, Judge.

Endorsed: Filed April 3, 1914.

(TITLE OF COURT AND CAUSE)

STIPULATION

It is hereby stipulated that for the purpose of saving expense of printing that the record printed in the above mat-

ter shall serve for both appeal and on petition for revision if petition for revision be made and allowed.

E. C. MILLION and I. E. SHRAUGER,
Attorneys for Bankrupt.
HADLEY, HADLEY & ABBOTT,
Attorneys for Trustee.
ROMAINE & ABRAMS,
Attorneys for Creditors.

Endorsed: Filed April 21, 1914.

(TITLE OF COURT AND CAUSE)

To the Clerk of the above entitled Court: Please prepare a transcript to be used on appeal in the above matter to consist of the following items, and in all cases after the first, or title page, you may omit the title of the court and cause where the same occurs at beginning of each instrument, and insert in lieu thereof as follows: (Title of court and cause). Said transcript to consist of

1. Bill of exceptions.
2. Order confirming referee's decision on exemptions.
3. Assignment of errors.
4. Appeal Bond.
5. Stipulation as to printing record.
6. This praecipe.

Omit all endorsements except date of filing.

Respectfully yours,

E. C. MILLION and I. E. SHRAUGER,
Attorneys for Jacob Yungbluth, Bankrupt.

Due service accepted this 20th day of April, 1914.

HADLEY, HADLEY & ABBOTT,
Attorneys for Trustee.

ROMAINE & ABRAMS,
Attorney for Geo. Henson, Creditor.

Endorsed: Filed April 21, 1914.

(TITLE OF COURT AND CAUSE)

CLERK'S CERTIFICATE TO TRANSCRIPT OF
RECORD

United States of America,
Western District of Washington.—ss.

I, Frank L. Crosby, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify the foregoing printed pages, numbered from 1 to 16 inclusive, to be a full, true, correct and complete copy of so much of the record and proceedings in the above and foregoing entitled cause as is called for by the praecipe of the attorneys for the bankrupt and appellant, as the same remain of record and on file in the office of Clerk of the said court, and that the same constitute the transcript of record on appeal from the District Court of the United States for the Western District of Washintgon to the Circuit Court of Appeals for the Ninth Judicial Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the appellant for preparation and certification of the typewritten transcript of record issued to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fees (Sec. 828 R. S. U. S. as Amended by Sec. 6, Act of March 2, 1905) for making transcript of the record for printing purposes, 33 folios at 30 cents per folio	\$ 9.90
Certificate to certified copy of typewritten transcript of record30
Seal to said certificate40
	<hr/>
	\$10.60

I hereby certify that the above cost for preparing and certifying record amounting to \$10.60 has been paid to me

by E. C. Million, Esquire, Attorney for Bankrupt and Appellant.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District this 24th day of April, 1914.

(Seal)

FRANK L. CROSBY, Clerk.

*United States Circuit Court of Appeals for the Ninth
Circuit.*

No. 2418.

In the Matter of JACOB YUNGBLUTH. and AUGUST
W. SCHAFER, Copartners Doing Business Under
the Firm Name and Style of BANK OF HAMIL-
TON, JACOB YUNGBLUTH & CO., Proprietors,
and BANK OF HAMILTON, A. W. SCHAFER
& COMPANY, Proprietors; and A. W. SCHAFER
& COMPANY, Private Bank; JACOB YUNG-
BLUTH and A. W. SCHAFER.

Bankrupts.

Petition for Revision.

To the Honorable Judges of the Circuit Court of Appeals
for the Ninth Circuit:

COMES NOW Jacob Yungbluth, the bankrupt, and re-
spectfully petitions this court for a review and revision
of an order made and entered by the District Judge for
the Western District of Washington, Northern Division,
made and entered on the 2d day of April, 1914, and in
support thereof shows to the Court as follows:

I.

That heretofore your petitioner was by said Court ad-
judged a bankrupt and thereafter filed his schedules
claiming certain exemptions including a homestead.

II.

That thereafter the trustee set aside said property as
exempt and thereafter on the objection of certain cred-
itors and said trustee the referee before whom said
proceeding was pending did make an order charging
said homestead with \$500.00 and interest as shown by a
note given by your petitioner to the Bank of Hamilton.

III.

That thereafter and upon appeal from said order of said referee to said District Court the same was affirmed.

IV.

Your petitioner charges that said referee and said District Court committed greivous error in holding that said homestead should be charged with said \$500.00 and interest and directing a sale of said homestead to pay the same.

WHEREFORE your petitioner prays that said order of said District Court and said referee be set aside and held for naught and that said homestead as so awarded be adjudged to be free and clear of any claim of the trustee or any creditor whatsoever, and that your petitioner be granted any other, further and different relief to which he may be entitled.

E. C. MILLION,

Attorney for Bankrupt.

Postoffice Address, 1202 Hoge Building, Seattle, King
County, State of Washington.

United States of America,

Western District of Washington,

Northern Division, King County,—ss.

E. C. Million, being first duly sworn, upon his oath deposes and says that he is attorney for Jacob Yungbluth, petitioner above named, and that the facts set forth in said petition are true as affiant verily believes. That affiant makes this verification on behalf of petitioner for the reason that the facts therein stated are within the personal knowledge of affiant and not within the personal knowledge of the petitioner.

E. C. MILLION.

Subscribed and sworn to before me this 23 day of May, 1914.

[Seal]

GEORGE FRIEND,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: No. 2418. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Jacob Yungbluth and August Schafer, Copartners Doing Business Under the Firm Name and Style of Bank of Hamilton, Jacob Yungbluth & Company, Proprietors, and Bank of Hamilton, A. W. Schafer & Co., Proprietors, and A. W. Schafer & Co., Private Bank, Jacob Yungbluth and A. W. Schafer, Bankrupts. Petition for Revision. Filed May 26, 1914. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit. By Meredith Sawyer, Deputy Clerk.

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IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF JACOB YUNG-
BLUTH and AUGUST W. SCHAFER,
co-partners doing business under the
firm name and style of Bank of Hamil-
ton, Jacob Yungbluth & Co. Proprietors,
and Bank of Hamilton, A. W. Schafer
& Company, Proprietors; and A. W.
Schafer & Company, Private Bank;
Jacob Yungbluth and A. W. Schafer,
Bankrupts,

No. 2418

BRIEF OF APPELLANT

JACOB YUNGBLUTH

E. C. MILLION,
PAUL W. HOUSER,
GEORGE FRIEND,
I. E. SHRAUGER,

Attorneys for Appellant.

Seattle, Washington.

Filed this.....day of....., 1914

By.....Deputy Clerk.

Press of Pliny L. Allen, Seattle, Washington

OCT 2 - 1914

IN THE
United States
Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF JACOB YUNG-
BLUTH and AUGUST W. SCHAFER,
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and Bank of Hamilton, A. W. Schafer
& Company, Proprietors; and A. W.
Schafer & Company, Private Bank;
Jacob Yungbluth and A. W. Schafer,

Bankrupts,

No.

BRIEF OF APPELLANT
JACOB YUNGBLUTH

E. C. MILLION,
PAUL W. HOUSER,
GEORGE FRIEND,
I. E. SHRAUGER,

Attorneys for Appellant.

Seattle, Washington.



IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF JACOB YUNG-
BLUTH and AUGUST W. SCHAFER,
co-partners doing business under the
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and Bank of Hamilton, A. W. Schafer
& Company, Proprietors; and A. W.
Schafer & Company, Private Bank;
Jacob Yungbluth and A. W. Schafer,
Bankrupts,

No.

BRIEF OF APPELLANT
JACOB YUNGBLUTH

STATEMENT

There are but two questions involved in this ap-
peal, and they are:

A. Has the court any authority or jurisdiction
over the exempt property of the bankrupt (the ap-

pellant) after it has once been determined that such property is exempt?

B. If the court has such jurisdiction, did it commit error in subjecting appellants' homestead to the payment of the \$500.00 which he owed the estate?

The facts in this case are that the bankrupt has been held by this court on a former appeal (185 Fed. 773) to have been to all intents and purposes a partner in the Bank of Hamilton, but a reference to the record in the former appeal (being case No. 1859 of the records of this court), it will be seen that appellant sold out his interest in the bank on January 25, 1905, but this court held the sale was so silently conducted as to be a mere make-shift and so did not relieve appellant from his responsibility.

Bankrupt following said dissolution and on June 10th, 1905, and seventeen months before the bank failed, purchased the property in question and which he has ever since used and occupied as a homestead.

When appellant filed his schedules he included this property but claimed it as exempt and the trustee in compliance with the law set the property aside as a homestead. Certain creditors appeared and objected to the allowance of the exemptions and the referee allowed all the exemptions claimed,

including the property in question, but held that in order to pay \$500.00 which appellant had borrowed from the bank the referee should sell the homstead unless the appellant repaid the money and interest which would make a total of about \$800.00.

Now, when appellant purchased the property he borrowed \$500.00 of the First National Bank of Mt. Vernon, and later in the year 1907 the bank paid the Mt. Vernon Bank the \$500.00 and took appellant's note for that amount which note is now held by the trustee.

It seemed to be the theory of the referee and the District Court that because appellant borrowed the money from the bank to repay the Mt. Vernon Bank that it constituted a fraud upon his creditors. We contend that the court had no authority or jurisdiction over the property, for under the laws of the State of Washington it was exempt and under the bankrupt law neither the trustee nor the court had any right to it, that is to say, that the property being exempt did not pass to the trustee.

We rely mainly on the case of *Lockwood v. Exchange Bank*, 190 U. S. 294, 47 Law. Ed. 1061, in which the Supreme Court of the United States held that title to property of a bankrupt generally ex-

empted by state laws, should remain in the bankrupt and not pass to his representative in bankruptcy, in which it said:

“The fact that the Act of 1898 confers upon the court of bankruptcy, authority to control exempt property in order to set it aside, and thus exclude it from the assets of the bankrupt estate to be administered, affords no just ground for holding that the court of bankruptcy must administer and distribute, as included in the assets of the estate, the very property which the act in unambiguous language, declares shall not pass from the bankrupt, or become part of the bankruptcy assets.”

The bankrupt laws provide in Clause 11 of Section 2, Courts of Bankruptcy are vested with jurisdiction to “determine all claims of bankrupts to their exemptions.”

Sec. 6. “This act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they have had their domicile for the six months or the greater part thereof immediately preceeding the filing of the petition.”

By Clause 8 of Section 7 the bankrupt is required to schedule all his property and to make a claim for such exemptions as he may be entitled to.

By Clause 11, Section 47, it is made the duty of the trustee to set apart the bankrupt's exemptions and report the items and estimated value thereof to the court as soon as practicable after their appointment.

By Section 67 it is provided that the property of the debtor fraudulently conveyed, etc., "shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt," etc.

In Section 70 is enumerated the property of the bankrupt which is to vest in the trustee as of the date of adjudication in bankruptcy "except in so far as it is to property which is exempt."

The Lockwood case has been cited and followed in
143 Fed. 1019, 51 S. E. 32;

In re Tugram, 125 Fed. 913;

In re Nye, 133 Fed. 34;

In re Downing, 148 Fed. 120;

In re Royce, 133 Fed. 108;

In re Mackissic, 71 Fed. 259;

In re O'Rear, 189 Fed. 888;

Huntington v. Baskerville, 192 Fed. 813;

In re Cheatham, 210 Fed. 370;

Graves v. Osborne (Ore.) 79 Pac. 500.

The constitution of the State of Washington concerning homesteads is contained in Article XIX and is as follows:

“The legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.”

Sec. 552 of Vol. 1 of Remington & Ballinger’s Code (Laws of 1895, page 112) is as follows:

“Homesteads may be selected and claimed in lands and tenements with the improvements thereon, not exceeding in value the sum of Two Thousand Dollars. The premises thus included in the homestead must be actually intended and used for a home for the claimants, and shall not be devoted exclusively to any other purposes.”

It was not contended in the lower court that the property claimed by appellant was not under the state laws exempt, in fact the court held it was exempt but that it was subject to the claim of \$500.00 and interest.

Even where a bankrupt in contemplation of bankruptcy takes property not exempt and converts it into exempt property the courts cannot reach it. 43 Fed. 702. 79 Fed. 706. 116 Fed. 31. 120 Fed. 733. 163 Fed. 924.

The Federal Courts are bound by the state laws and decisions in homestead matters.

Bank v. Glass, 79 Fed. 706;

In re Cochran, 185 Fed. 913.

The undisputed facts are that appellant purchased this homestead property in June, 1905, and the bank did not fail until November, 1907. How can that be deemed fraud upon creditors?

The property was acquired long before the contemplated bankruptcy.

The cases cited above hold that the bankrupt has a right to convert into exempt property that which was not exempt in contemplation of bankruptcy.

What are exempt laws for but as a place of refuge from the storm of creditors?

We respectfully submit that the judgment of the referee and District Judge should be set aside.

E. C. MILLION,
GEORGE FRIEND,
PAUL W. HOUSER,

Seattle, Wash.;

I. E. SHRAUGER,
Mt. Vernon, Wash.,
Attorneys for Appellant.

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

IN THE MATTER OF JACOB
YUNGBLUTH and AUGUST W.
SCHAFFER, co-partners doing busi-
ness under the firm name and style of
Bank of Hamilton, Jacob Yungbluth
& Co. Proprietors, and Bank of Ham-
ilton, A. W. Schaffer & Company, Pro-
prietors; and A. W. Schaffer & Com-
pany, Private Bank; Jacob Yung-
bluth and A. W. Schaffer,

Bankrupts.

No. 2418

BRIEF OF APPELLEES

L. H. HADLEY,
A. M. HADLEY,
W. H. ABBOTT,
J. W. ROMAINE,

Bellingham, Washington

Attorneys for Appellees

Filed this.....day of.....1914.

By,.....Deputy Clerk.

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United States
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pany, Private Bank; Jacob Yung-
bluth and A. W. Schaffer,

Bankrupts.

No.....

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L. H. HADLEY,
A. M. HADLEY,
W. H. ABBOTT,
J. W. ROMAINE,

Attorneys for Appellees

Bellingham, Washington

IN THE
United States
Circuit Court of Appeals
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IN THE MATTER OF JACOB
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prietors; and A. W. Schaffer & Com-
pany, Private Bank; Jacob Yung-
bluth and A. W. Schaffer,

Bankrupts.

No.....

BRIEF OF APPELLEES

STATEMENT.

The appellant in the opening statement of his brief has attempted to limit the questions involved on this appeal, to two; but both are summed up in the

second question as presented by him since it is a mere repetition of the second assignment of error set forth in the transcript of record herein.

It is the contention of the appellees that the question might more fairly be stated :

Can a bankrupt, who has been adjudged as such because of his membership in a co-partnership which has become insolvent, claim property as exempt, as against creditors of the co-partnership, which property has been purchased with co-partnership moneys, or moneys withdrawn from the co-partnership for that purpose, at a time when the co-partnership was insolvent? As indicated in appellant's brief, the appellant

herein was adjudged bankrupt by the District Court, which adjudication was sustained upon appeal by this Court, because of the fact that he was a member of a co-partnership conducting the Bank of Hamilton.

So far as this Court had to do with that proceeding its decision will be found in 185 Federal, 773. The last paragraph of that decision is as follows:—

“Upon the issue of insolvency the appellant's defense was submitted to a jury and the fact that his individual assets exceeded his individual debts could not relieve him of the charge of insolvency as a member of the partnership, *for the total assets of the partners and of the*

firm were insufficient to pay the partnership debts."

The italics in the above quotation are our own for purposes of emphasis.

In fact all of the debts proven in the above proceeding were debts of the co-partnership and the individual property of the bankrupt Yungbluth was taken over by the trustee, only because of its liability for the payment of these partnership debts.

We do not agree with counsel for appellant that the effect of the holding in the case last above referred to was, as indicated by appellant in his brief, "that appellant had sold out his interest in the bank on January 25th, 1905, but this Court held the sale was so silently conducted as to be a mere makeshift and so did not relieve appellant from his responsibility." A reference to the opinion and decision of this Court in that case, will, we think, clearly disclose that the finding and judgment of the District Court and this Court on that question was, that the partnership which conducted the Bank of Hamilton, had never dissolved prior to the proceedings in bankruptcy herein, and that being the case, there could

have been no "*selling out*" by the appellant Yungbluth in 1905.

Therefore, while the partnership existed and was in full force, in June of 1905, the appellant purchased the property in question, which he thereafter used and occupied, and which he now claims as exempt as a homestead under the exemption laws of the State of Washington.

It was, and is, the contention of the objectors to the setting aside of said homestead as exempt, which objectors are the appellees herein, that the property in question was purchased with funds of the co-partnership, and not with the individual funds of the bankrupt Yungbluth, and was therefore co-partnership assets, held in trust for the partnership and its creditors by the appellant Yungbluth, and therefore not subject to a claim of exemption by him as an individual.

A reference to the transcript of records herein will disclose that the books of the bank were burned on January 9th, 1909, a little more than a year after they had been taken possession of by a receiver appointed by the State Court of the State of Washington, and prior to the final adjudication herein,

(Transcript of Record, p. 3) and it was therefore very difficult to obtain the facts relative to the purchase of the property in question here.

However, it does appear that on or about January 19, 1905, much juggling of the accounts of the bank was had by the co-partners, the ultimate result of which was the changing of an overdraft of the appellant herein, Yungbluth, of \$1633.67 on the books of the bank, to a credit balance of \$950.00 (Transcript of Record, pp. 4 and 5), and that when the appellant Yungbluth purchased the property in question, he applied \$600.00 of this balance on the purchase price and ostensibly borrowed \$600.00 more from the bank, which constituted the entire purchase price of the property with the exception of \$100.00, which he had previously paid as "earnest money." (Transcript of Record, pp. 4 and 5). This was on June 10th, 1905, and twelve days later the note representing the \$600.00 borrowed, was paid by a check or draft from the First National Bank of Mt. Vernon (Transcript of Record, p. 6).

This payment was made as nearly as we can gather from the somewhat uncertain testimony of the appellant as a result of the appellant having given the

Mt. Vernon bank his note for that amount. (Transcript of Record, pp. 8 and 9); but thereafter, in 1907, the Bank of Hamilton paid the Mt. Vernon bank, \$500.00 of this amount, and the appellant gave his note to the Bank of Hamilton for that amount, which note passed into the hands of the receiver appointed by the State Court for the Bank of Hamilton, and ultimately into the hands of the trustee in bankruptcy herein, who now holds it. This fact is undisputed and is admitted by the appellant herein (Transcript of Record, p. 9).

It was this \$500.00 which the referee found was borrowed by the appellant from the Bank of Hamilton, and constituted a part of the investment in the homestead claimed by the appellant, and was and constituted a fraud against the creditors of the bank; and the referee concluded and ordered that the homestead should be charged with the amount due on said note including interest (Transcript of Record, pp. 2 and 3). And this order of the referee was confirmed by order of the District Court for the Western District of Washington, Northern Division, under the jurisdiction of which Court said Referee was acting, on the 2nd day of April, 1914 (Transcript of Record, p. 11).

ARGUMENT.

Upon the foregoing facts, all of which appellees insist are sustained by the record, it seems clear that the referee might in justice have found that the entire property claimed by the appellant herein as exempt, was property of the co-partnership, purchased with partnership assets, but in view of the uncertainty of the testimony as submitted to him, he only found that the \$500.00 originally taken from the Bank of Hamilton, repaid to it by the Mt. Vernon bank, and again repaid to the Mt. Vernon bank by the Bank of Hamilton, was partnership money, and to that extent the partnership was an owner in the property claimed by Yungbluth as an individual, as exempt.

We know of no law in the State of Washington or elsewhere, which authorizes an individual member of a co-partnership to claim as exempt from liability of the co-partnership, and for his own use and benefit, properties or moneys of the co-partnership.

The question of the jurisdiction of the Court over exempt property of the bankrupt, is not involved, since, as above shown, the property in question,

at least to the extent which the referee found, was not the property of the individual bankrupt, and while it is true that the trustee in pursuance of Clause II, Section 47, of the Bankrupt Act, formally set over to the appellant herein the property claimed by him as exempt, upon the objection of creditors it was found by the Court that the same was not in fact his property, but belonged to the co-partnership and was liable for the payment of the partnership debts.

Appellant has argued in his brief, that even where a bankrupt in contemplation of bankruptcy, takes property not exempt and converts it into exempt property, the courts cannot reach it, but we do not concede that this rule should be extended to the extent that a co-partner may withdraw partnership assets and invest them in property, taking the title in his own name, and then claim the same as exempt as against creditors of the co-partnership. We think, as expressed by the District Court in this case, that the facts show a fraud practiced by the appellant upon the creditors of the bank, and that he is seeking to reap the benefit of this fraud through the round about method of a claim of exemption, and that while

it is true that fraud must be proven and not presumed, it is also true that a bankrupt claiming a homestead takes the burden of proof in establishing his right to the homestead, and that the right of the bankrupt to take the homestead free from the claim allowed by the referee and District Court herein, depended upon whether at the time the money was withdrawn from the partnership and invested in the homestead, the partnership was solvent or insolvent.

The close proximity of the time within which the money was so withdrawn from the bank to the date upon which it was declared insolvent, certainly raises a presumption that it was insolvent at the time the moneys were withdrawn, and the burden of establishing its solvency at the time of the withdrawal of such money, was upon the appellant, and this burden he has certainly not sustained as shown by the record.

Appellant argues in his brief, that he purchased this alleged homestead property in June of 1905, and that the bank did not fail until 1907, and that this therefore could not be deemed a fraud upon creditors; but the facts as above shown, are that the purchase was made with the bank funds at least to the extent of

the \$500.00 found by the referee; that these funds were temporarily replaced in the bank by the appellant, but subsequently returned and repaid by the bank in 1907 shortly before the adjudication of insolvency of the bank, and therefore in fact and in contemplation of law, the funds invested were those of the bank or co-partnership.

Appellant inquires near the close of his brief,—“What are exemption laws for but as a place of refuge from the storm of creditors?” They were certainly not invented to permit a member of a co-partnership engaged in a banking business, which is at least a *quasi* trust business in its relation to the public and its creditors, to use the funds of its creditors consisting of deposits, for the purchase of private property for the benefit of himself and family, to the exclusion of those who had put their trust in, and deposited their moneys and effects with the banking partnership.

We therefore respectfully submit that the order and judgment of the referee, sustained and confirmed by the order of the District Court in the above entitled matter, should be fully affirmed by this Court, to

the end that justice in so far as it may be administered under the complex situation involved in this case, may be rendered.

Respectfully submitted,

L. H. HADLEY,
A. M. HADLEY,
W. H. ABBOTT,
J. W. ROMAINE,

Bellingham, Washington,

Attorneys for Appellees.

No. 2419

United States
Circuit Court of Appeals
For the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,
Plaintiff in Error,
VS.
FRED WHITSETT,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

FILED
JUL 1 - 1914

No. 2419

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*In the Superior Court of the State of California, in
and for the County of Shasta.*

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Private Corporation,

Defendant.

Complaint.

The plaintiff complains and for cause of action alleges:

I.

That the defendant, Balaklala Consolidated Copper Company, is and was, at all the times herein mentioned, a private corporation, duly organized and existing under and pursuant to the laws of the State of Nevada, and is now, and at all times herein mentioned was, engaged in the business of mining and operating a quartz mine situate in the County of Shasta, State of California.

II.

That on the 9th day of March, 1909, the said defendant, Balaklala Consolidated Copper Company, was engaged in tunneling, working and operating that certain mine commonly known as and called the "Balaklala Mine," near Coram, California.

III.

That prior to said 9th day of March, 1909, the said plaintiff, Fred Whitsett, then aged 23 years, was employed by the said defendant, Balaklala Consolidated Copper Company, as a mucker and driller and

laborer, to work in said defendant's mine, and the plaintiff was, on the said 9th day of March, 1909, in pursuance of said contract of employment, and at No. 400 level, and as such driller and mucker and laborer, engaged in the work of operating [1*] a drill in a tunnel in said mine for said defendant corporation.

IV.

That the said defendant failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for plaintiff to perform his said labor as aforesaid, and particularly in this:

That on the 9th day of March, 1909, while the plaintiff herein was so working as driller, mucker and laborer for the said defendant, in operating a drill at the face of the tunnel, in pursuance of the said employment and at a place where he was required and directed by said defendant to work, the drill so operated by him ran into and exploded a charge of powder, which had been placed there by the defendant, then and at all times theretofore unknown to this plaintiff;

That the said powder so exploded fractured the plaintiff's skull, fractured his right arm and greatly bruised, broke, damaged, injured and hurt him in his mind, body and limbs, and plaintiff became and was thereby made sick, sore, lame and disordered and has so remained, and will so remain for his natural life; and by reason of said injuries the said plaintiff has been disabled for life, incapacitated and rendered unable to perform any manual labor, which plaintiff

*Page number appearing at foot of page of original certified Record.

alleges is his only means of living, except by charity;

That the said injuries so sustained do and will permanently affect and impair the health and strength of, and have permanently disabled plaintiff from the 9th day of March, 1909, from performing work of any kind, and ever since the said accident plaintiff has suffered great pain of body and anguish of mind as a result, and by reason of said injuries, and by reason thereof, said plaintiff has been damaged in the sum of Fifty Thousand (\$50,000.00) Dollars.

That by reason of said injuries the plaintiff has been [2] further damaged in the sum of \$500.00 for medical attendance, nurse hire, medicines and hospital expenses.

WHEREFORE, plaintiff prays judgment against said defendant Balaklala Consolidated Copper Company, that said plaintiff recover from said defendant the sum of Fifty Thousand Five Hundred (\$50,500.00) Dollars, and his costs of suit.

C. S. JACKSON,

T. W. H. SHANAHAN,

Attorneys for Plaintiff.

State of Oregon,

County of Douglas,—ss.

Fred Whitsett, being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that he has read the above and foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief, and as to those matters that he believes it to be true.

FRED WHITSETT.

4 *Balaklala Consolidated Copper Company*

Subscribed and sworn to before me, this 2d day of February, 1910.

[Notarial Seal]

J. L. CAMPBELL,
Notary Public for Oregon.

[Endorsed]: No. 4145. File 218. Filed Mar. 8, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy Clerk. [3]

Sheriff's Office,
County of Shasta,
State of California,—ss.

I hereby certify that I received the within Summons on the 17th day of March, A. D. 1910, and personally served the same upon the Balaklala Consolidated Copper Company, a corporation, by delivering to and leaving with R. T. White, the Managing Agent of said Balaklala Consolidated Copper Company, a corporation, in the County of Shasta, State of California, on the 25th day of April, A. D. 1910, a copy of said Summons; and that the copy Summons so delivered to and left with said R. T. White, as Managing Agent of said defendant corporation, was attached to a copy of the complaint in said action.

Dated at Redding, Calif., this 26th day of April, A. D. 1910.

JAS. L. MONTGOMERY,
Sheriff.

Sheriff's fees, \$.75¢. [4]

[**Summons.**]

*In the Superior Court of the County of Shasta, State
of California, Department 1.*

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Action brought in the Superior Court of the County
of Shasta, State of California, and the Com-
plaint filed in said County of Shasta in the office
of the Clerk of said Superior Court.

The People of the State of California Send Greeting
to Balaklala Consolidated Copper Company, a
Private Corporation, Defendant.

You are hereby required to appear in an action
brought against you by the above-named Plaintiff,
in the Superior Court of the County of Shasta, State
of California, and to answer the Complaint filed
therein, within ten days (exclusive of the day of
service) after the service on you of this Summons, if
served within said County; if served elsewhere,
within thirty days.

And you are hereby notified that if you fail to ap-
pear and answer, the plaintiff will take judgment
for any money or damages demanded in the Com-
plaint as arising upon contract, or will apply to the
Court for any other relief demanded in the Com-
plaint.

WITNESS my hand and seal of said Superior Court of the County of Shasta, State of California, this 8th day of March, 1910.

[Seal of Said Superior Court.]

S. N. WITHEROW,

Clerk. [5]

Rec'd Mar. 17, 1910—190, at 3:30 P. M.

J. L. MONTGOMERY,

Sheriff.

By Alex. Ludwig,

Deputy.

[Endorsed]: Filed Apr. 27, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy Clerk. [6]

*In the Superior Court of the State of California,
in and for the County of Shasta.*

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Notice of Motion for Order of Removal.

To Messrs. C. S. Jackson and T. W. H. Shanahan,
Attorneys for Plaintiff:

Please take notice that the defendant will on Saturday, the 14th day of May, 1910, at ten o'clock A. D. or as soon thereafter as counsel can be heard, move the Court, at the courtroom thereof, at Redding, in the county of Shasta, State of California, for an order removing said cause to the Circuit Court of

the United States for the Ninth Circuit, Northern District of California, in accordance with the petition of the defendant, a copy of which is hereto attached.

Dated this 3d day of May, A. D. 1910.

C. H. WILSON,

Attorney for Defendant. [7]

*In the Superior Court of the State of California,
in and for the County of Shasta.*

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

**Petition for Removal to United States Circuit Court
on Ground of Diverse Citizenship.**

To the Honorable Superior Court of Shasta County,
State of California:

The petition of the Balaklala Consolidated Copper Company, a private corporation, defendant in the above-entitled action, respectfully shows to this Honorable Court:

That your petitioner is the defendant in the above-entitled action.

That said action has been begun against it in the above-entitled court by said plaintiff, and that said action is of a civil nature.

That plaintiff in his complaint herein claims in substance: That on the 9th day of March, 1909, this defendant was engaged in tunneling, working and

operating that certain mine known as the "Balaklala Mine," near Coram, California. That on said day, Fred Whitsett, was employed by this defendant to work in said mine, and on said day was engaged in the work of operating [8] a drill in a tunnel in said mine, and that on said day this defendant failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for plaintiff, Fred Whitsett, to perform his said labor, and that while so working in said tunnel and operating the drill aforesaid, it ran into and exploded a charge of powder, thereby personally injuring the plaintiff and fracturing his skull and his right arm, and greatly injuring and hurting him in his mind, body and limbs, and that thereby plaintiff became and was made sick, sore, lame and disordered, and by reason of said injuries, plaintiff claims to have been disabled for life, incapacitated and unable to perform any manual labor, to his damage in the sum of Fifty Thousand Dollars (\$50,000.00), and that by reason of said injuries plaintiff has been further damaged in the sum of Five Hundred Dollars (\$500.00) for medical attendance, nurse hire and hospital expenses.

That your petitioner disputes said claim and denies that it was careless or negligent in any manner proximately causing the accident complained of, and denies any and all liability in law to respond in damages to the claim of the plaintiff set forth in said complaint.

That the matter in dispute in this action exceeds

the sum of Two Thousand Dollars, exclusive of interest and costs.

That the controversy in this action and every issue of fact and law therein is wholly between citizens of different States and which can be fully determined as between them, that is to say: The plaintiff, Fred Whitsett, is now and was at the time of the filing of the complaint in this action a citizen and resident of the State of California, and that the defendant, Balaklala Consolidated Copper Company, a private corporation, your petitioner herein, was then and still is a corporation duly organized and doing [9] business under and by virtue of the laws of the State of Nevada, and a citizen and resident of said State of Nevada.

That the time for your petitioner, as defendant in this action, to answer or plead to the complaint in this action, has not yet expired, and will not expire until the 5th day of May, 1910, and your petitioner has not yet filed or in any way appeared therein.

That your petitioner herewith presents a good and sufficient bond, as provided by the statute in such cases, that it will, on or before the first day of the next ensuing session of the United States Circuit Court for the Ninth Circuit, Northern District of California, file therein a transcript of the record of this action, and for the payment of all costs which may be awarded by the said court if the said Circuit Court shall hold that this suit was wrongfully or improperly removed thereto.

Your petitioner therefore prays that this Court proceed no further herein, except to make the order

10 *Balaklala Consolidated Copper Company*

of removal, as required by law, and to accept the bond presented herewith and direct a transcript of the record herein to be made for said Court as provided by law, and as in duty bound your petitioner will ever pray.

Dated this 3d day of May, A. D. 1908.

BALAKLALA CONSOLIDATED COPPER
COMPANY.

By C. H. WILSON,
Its Attorney.

C. H. WILSON,
Attorney for Defendant. [10]

State of California,
City and County of San Francisco,—ss.

C. H. Wilson, being duly sworn, deposes and says: That he is the attorney for the defendant in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and, as to such matters, that he believes it to be true; that the facts stated in said petition are within the knowledge of affiant.

C. H. WILSON.

Subscribed and sworn to before me, this 3d day of May, 1910.

[Notarial Seal] C. B. SESSIONS,
Notary Public in and for the City and County of
San Francisco, State of California. [11]

[Endorsed]: No. 4145. 218. Filed May 4, 1910.
S. N. Witherow, Clerk. By W. O. Blodgett, Deputy. [12]

*In the Superior Court of the State of California in
and for the County of Shasta.*

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned,

UNITED SURETY COMPANY,
a corporation duly organized and doing business under the laws of the State of Maryland, and duly licensed to transact the business of a surety company in the State of California, is held and firmly bound unto Fred Whitsett, plaintiff in the above-entitled cause, his heirs, personal representatives and assigns, in the sum of ONE THOUSAND DOLLARS, lawful money of the United States of America, for the payment of which well and truly to be made, the undersigned binds itself and its successors firmly by these presents.

THE CONDITIONS OF THIS OBLIGATION
ARE SUCH, THAT;

WHEREAS, the Balaklala Consolidated Copper Company, a private corporation, the defendant above named, has applied by petition to the Superior Court of the State of California, in and for the County of Shasta, for the removal of a certain cause therein

12 *Balaklala Consolidated Copper Company*

pending wherein Fred Whitsett is plaintiff, and said Balaklala Consolidated Copper Company, a private corporation, is defendant, to the Circuit Court of the United States for the Ninth Circuit, Northern District of California, for further proceedings on grounds in the said [13] petition set forth, and that all further proceedings in said action in said Superior Court be stayed.

NOW, THEREFORE, if your petitioner the said Balaklala Consolidated Copper Company, a private corporation, shall enter in said Circuit Court of the United States for the Ninth Circuit, Northern District of California, aforesaid, on or before the first day of the next regular session, a copy of the records in said suit, and shall pay, or cause to be paid, all costs that may be awarded therein by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

IN WITNESS WHEREOF, the said UNITED SURETY COMPANY, a private corporation, as aforesaid, has duly caused these presents to be signed with its corporate name and its corporate seal to be hereto affixed this 3d day of May, A. D. 1910.

[Seal of Corporation.]

UNITED SURETY COMPANY.

By D. DUNCAN,

Resident Vice-President.

Attest: J. M. HOYT,

Resident Ass't Sec'y.

[Endorsed]: Filed May 4, 1910. S. N. With-
erow, Clerk. By W. O. Blodgett, Deputy. [14]

*In the Superior Court of the State of California in
and for the County of Shasta.*

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Order of Removal.

This cause coming on for hearing upon the appli-
cation of the defendant herein for an order trans-
ferring this cause to the United States Circuit Court
for the Ninth Circuit, Northern District of Califor-
nia, and it appearing to the Court that the defendant
has filed its petition for such removal in due form
of law, and that the defendant has filed its bond duly
conditioned with good and sufficient sureties, as pro-
vided by law, and it appearing to the Court that it
is a proper case for removal to said Circuit Court,—

NOW, THEREFORE, IT IS HEREBY OR-
DERED AND ADJUDGED that this cause be, and
it hereby is, removed to the United States Circuit
Court, for the Ninth Circuit, Northern District of
California, and the Clerk is hereby directed to make
up the record in said cause for transmission to said
Court forthwith.

Done in open court this 14th day of May, A. D.
1910.

J. E. BARBER,
Presiding Judge. [15]

County Clerk's Office,
County of Shasta,—ss.

I, S. N. Witherow, County Clerk of the County of Shasta, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full and correct copy of the complaint, summons, sheriff's return, notice of motion for order of removal, petition for removal to United States Circuit Court, bond on removal, and order of removal in case of Fred Whitsett, plaintiff, vs. Balaklala Consolidated Copper Company, a corporation, defendant, now on file and of record in my office.

WITNESS my hand and the seal of said Court this 16th day of May, 1910.

[Seal]

S. N. WITHEROW,
Clerk.

By W. O. Blodgett,
Deputy.

[Endorsed]: Filed July 6th, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [16]

*In the Circuit Court of the United States in and for
the Ninth Circuit, Northern District of Cali-
fornia.*

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Demurrer [to Complaint].

Now comes the defendant above named and demurs to the complaint of the plaintiff herein and as grounds for demurrer states and alleges:

I.

That said complaint does not state facts sufficient to constitute a cause of action.

II.

That said complaint is uncertain, inasmuch as it does not appear therein nor can it be ascertained therefrom how or in what manner or to what extent plaintiff was greatly or at all bruised or broke or damaged or injured or hurt in his mind or body or limbs; or how or in what manner or to what extent the plaintiff became or was, by reason of the accident in the complaint described, made sick or sore or lame or disordered, nor how or in what manner or to what extent plaintiff has been disabled for life or incapacitated and rendered unable to perform any manual labor. [17]

WHEREFORE this defendant prays that the complaint of the plaintiff herein be dismissed and that it have judgment for its costs and disbursements most wrongfully sustained.

Dated this 30th day of June, 1910.

C. H. WILSON,
Attorney for Defendant.

[Endorsed]: Filed Jul. 6, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[18]

At a stated term, to wit, the July term A. D. 1910, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 3d day of October, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, Judge.

No. 15,143.

FRED WHITSETT

vs.

BALAKLALA CONSOLIDATED COPPER CO.
et al.

Order Overruling Demurrer [to Complaint].

Defendant's demurrer to complaint herein came on this day to be heard and after argument by counsel for both sides was submitted and being considered by the Court, it was ordered that said demurrer be and the same is hereby overruled. [19]

*In the Circuit Court of the United States, in and for
the Ninth Circuit, Northern District of Cali-
fornia.*

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Answer.

Now comes the defendant above named and for its answer to the complaint of the plaintiff herein admits, denies, states and alleges as follows, to wit:

I.

This defendant admits each and every allegation, matter and thing contained in paragraphs one (I), two (II), and three (III) of plaintiff's complaint, except that defendant denies that the plaintiff was employed by it as a mucker and driller and laborer, or as a mucker or driller or laborer, and in that behalf alleges that plaintiff was employed as a chuck-tender or helper, and not otherwise; defendant further denies that on the 9th day of March, 1909, or on any other day, in pursuance of the contract of employment set out in the complaint, or any contract, the plaintiff was engaged as such, or any, driller and mucker and laborer, or driller or mucker or laborer, in the work of operating a drill in a tunnel in said, or any, mine of this defendant; and in that behalf this defendant alleges that plaintiff was, at the time alleged in the complaint, employed and engaged only as a chuck-tender or helper and that plaintiff was not employed or empowered or authorized to work as a driller in the tunnel or mine of this defendant.

[20]

II.

This defendant denies that it failed and neglected, or failed or neglected, to exercise ordinary, or any, care in providing and maintaining, or providing or maintaining, a safe, suitable and proper, or safe or

suitable or proper, place for plaintiff to perform his said, or any, labor, as in the complaint alleged or otherwise or at all, or particularly in this: That on the 9th day of March, 1909, or on any other day, while the plaintiff was so, or at all, working as a driller, mucker and laborer, or driller or mucker or laborer, for this defendant in operating a drill at the face of the tunnel or elsewhere, in pursuance of said, or any, employment, or at all, at a place where he was required and directed, or required or directed, by this defendant to work, the drill so operated by him ran into and exploded, or ran into or exploded a charge of powder, which had been placed there by this defendant, then and at all times, or then or at all times, theretofore unknown to the plaintiff; and in that behalf this defendant alleges that it was no part of the duty of the plaintiff to operate a drill at the face of the tunnel described in the complaint. This defendant has no information or belief upon the subject sufficient to enable it to answer the allegations of the complaint in that behalf, and placing its denial on that ground, denies that the said, or any powder, so, or, in any manner, exploded, fractured the plaintiff's skull, fractured his right arm, or greatly bruised, broke, damaged, injured and hurt, or greatly, or at all, bruised or broke or damaged or injured or hurt, him in his mind, body and limbs, or mind or body or limbs, or that plaintiff became or was thereby, or at all, made sick, sore, lame and disordered, or sick, or sore or lame or disordered, or has so remained, or will so remain for his natural, or any, life. In like manner denies that by [21]

reason of said, or any, injuries, the said plaintiff has been disabled for life, incapacitated and rendered unable, or disabled for life or incapacitated or rendered unable, to perform any manual labor. In like manner denies that manual labor is the only means of living, except by charity, of the plaintiff. In like manner denies that the injuries alleged in the complaint, so, or in any manner, sustained, do, or will permanently, or at all, affect and impair, or affect or impair, the health and strength, or health or strength, of, or have permanently, or at all, disabled plaintiff from the 9th day of March, 1909, or from any other day or time whatsoever, from performing work of any kind, or ever since the said or any, accident plaintiff has suffered great, or any, pain of body or anguish of mind as a result or by reason of said, or any, injuries, or by reason thereof said plaintiff has been damaged in the sum of Fifty Thousand Dollars (\$50,000), or in any other sum or amount, whatsoever. In like manner denies that by reason of said, or any, injuries the plaintiff has been further, or at all damaged in the sum of Five Hundred Dollars (\$500.00) for medical attendance, nurse hire, medicines and hospital expenses, or medical attendance or nurse hire or medicines or hospital expenses.

III.

Further answering, this defendant alleges that it was not guilty of any carelessness or negligence whatsoever, whereby the plaintiff was hurt or injured or damaged, as in the complaint alleged.

IV.

For a further and separate defense herein, this

defendant alleges that it was not guilty of carelessness, negligence or improper conduct, as in the complaint alleged, and says that the injuries therein described, if any there were, were caused by the [22] fault and negligence of the plaintiff.

V.

For a further and separate defense herein, this defendant alleges that it was not guilty of carelessness, negligence or improper conduct, as in the complaint alleged, and says that the injuries therein described, if any there were, were the result and due to the plaintiff's encountering obvious and known risks and dangers incident to the work in which he was engaged and which were assumed by him in his contract of employment.

WHEREFORE, this defendant prays that the complaint of the plaintiff herein be dismissed and that it have judgment for its costs and disbursements most wrongfully sustained.

Dated this 25th day of November, 1910.

C. H. WILSON,

Attorney for Defendant. [23]

State of California,

City and County of San Francisco,—ss.

C. H. Wilson, being duly sworn, deposes and says: That he is the attorney for the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information or belief, and as to such matters that he believes it to be true. That the reason this verification is not made by the defendant or

one of its officers is that they and each of them are absent from the City and County of San Francisco, where this affiant, the attorney for said defendant, has his office.

C. H. WILSON.

Subscribed and sworn to before me this 25th day of November, 1910.

[Seal]

C. B. SESSIONS,

Notary Public in and for the City and County of San Francisco, State of California.

Service of the within Answer and receipt of a copy thereof is hereby acknowledged this 25th day of November, 1910.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 28, 1910. Southard Hoffman, *Deputy* Clerk. By J. A. Schaertzer, *Deputy* Clerk. [24]

*In the Circuit Court of the United States, Ninth
Judicial Circuit, Northern District of Cali-
fornia.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Motion for Leave to File Amended Complaint.

To the Defendant Above Named, and C. H. Wilson,
Esq., Its Attorney:

You and each of you will please take notice that on Monday, the 24th day of July, 1911, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, the plaintiff will move the above-entitled court, Hon. W. C. Van Fleet, presiding, at the courtroom thereof in the Postoffice building, on the northeast corner of Mission and Seventh Streets, San Francisco, California, for an order allowing plaintiff to file herein, his amended complaint attached hereto, a copy of which has heretofore been served on C. H. Wilson, attorney for defendant herein.

Said motion will be made on the ground that said order will be in pursuance of justice, and will be based upon this notice of motion, and upon all the papers, records, files and proceedings in said action, and upon such evidence as may be introduced at the hearing hereof.

Dated July 18, 1911.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff. [25]

*In the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.*

FRED WHITSETT,

Plaintiff,

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Amended Complaint.

Plaintiff complains and for Amended Complaint
alleges:

That the defendant is and was at all the times and
dates herein mentioned a private corporation, duly
organized and existing under and by virtue of the
laws of the State of Nevada, and is now, and at all
times herein mentioned was, engaged in the business
of mining and operating a quartz mine situate in
Shasty County, State of California.

Second.—That on the 9th day of March, 1909, the
said defendant was engaged in tunneling, working
and operating that certain mine commonly known
as and called the “Balaklala Mine” near Coram,
Shasta County, State of California.

Third.—That prior to the said 9th day of March
1909, the said plaintiff, then aged 23 years, was em-
ployed by the said defendant as a “chuck-tender”
or helper to the driller, to work in said defendant’s
mine, and the plaintiff was on the said 9th day of
March, 1909, in pursuance of said contract of em-
ployment, and at No. 400 level, and as such “chuck-

tender" or helper to the driller, engaged in the work of assisting operating a drill in a tunnel of said mine by said defendant.

Fourth.—That the said defendant failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for plaintiff to perform his said labor aforesaid, and failed and neglected to provide a careful [26] and competent man, and had in their employ at that time a man known to the defendant to be unreliable and careless, whose express duty is was to locate, mark and report to the on-coming shift unexploded charges of *pwder*, and determine the safety of the place they were to work in, and particularly in this: That on the evening of the said 9th of March, 1909, when the plaintiff, and his driller, Frank Whitsett (his brother), went on their shift that evening and while so engaged in working as aforesaid in helping operate a drill at the face of the tunnel where plaintiff was required and directed by defendant to work in pursuance of said employment, plaintiff and his driller were ordered and directed by the defendant to complete an unfinished hole on the face of said tunnel, left so by the retiring shift, and in obedience to said order of the defendant the plaintiff and his driller undertook the completion of said hole under defendant's directions, and while so engaged the drill so operated by plaintiff and his driller ran into and exploded a charge of powder then and at all times theretofore unknown to the plaintiff or his driller, and of which the defendant was charged with knowledge and notice thereof, which knowledge or

notice thereof defendant failed and neglected to communicate to plaintiff or his driller.

Fifth.—That the defendant then had in its employ, as heretofore alleged, a man designated as the “missed-hole” man, whose express duty is to examine the place where the on-coming shift is to work to ascertain its safety and is free from danger, and locate, mark and report to the on-coming shift all unexploded charges of powder, if any. That the defendant, though it had ample time and opportunity so to do, failed and neglected and [27] did not use due care to mark or report to plaintiff’s on-coming shift, said, or any unexploded charges of powder, and the defendant then and there carelessly and negligently performed its duty in that behalf, leaving plaintiff to believe that a proper examination of said place where plaintiff was directed to work as aforesaid, had been made and that the same was free from danger and safe to pursue the work of completing the unfinished hole he was ordered and directed to do. That the missed-hole man then in the defendant’s employ whose duty it was to locate unexploded charges of powder and report as aforesaid, was careless and incompetent and known to be so by the company, the defendant company, and addicted to the drink habit. That the said powder so exploded fractured the plaintiff’s skull, fractured his right arm and greatly bruised, broke, damaged, injured and hurt him in his body and mind, and limb, and plaintiff became and was thereby made sick, sore, lame and disordered and has so remained, and will so remain for his natural

life; and by reason of said injures the said plaintiff has been disabled for life, incapacitated and rendered unable to perform manual labor, which plaintiff alleges is his only means of living, except by charity. That the said injuries so sustained do and will permanently affect and impair the health, mind and strength of the plaintiff, and have permanently disabled plaintiff ever since he received the said injuries, and plaintiff has suffered great pain of body and anguish of mind as a result and by reason of said injuries said plaintiff has been damaged in the sum of Fifty Thousand Dollars (\$50,000.00).

That by reason of said injuries the plaintiff has been [28] further damaged in the sum of \$750.00 for medical attendance, nurse hire, medicines and hospital expenses, and is still under the care of the doctor.

WHEREFORE plaintiff prays judgment against the defendant, Balaklala Consolidated Copper Company, that said plaintiff do recover from and of said defendant the sum of Fifty Thousand Dollars (\$50,000.00), and the further sum of \$750.00 special damages, and his costs and disbursements herein.

C. S. JACKSON,

WM. M. CANNON,

Attorneys for Plaintiff.

State of Oregon,

County of Douglas,—ss.

I, Fred Whitsett, being first duly sworn, depose and say that I am the plaintiff making the foregoing complaint; that I have read the same and know the

contents thereof; that the same are true as I verily believe.

FRED WHITSETT.

Subscribed and sworn to before me this 20th day of Feb., 1911.

[Seal]

A. G. CLARKE,

Notary Public for Oregon.

Service and receipt of a copy of the within Notice of Motion, etc., and Amended Complaint is hereby admitted this 18th day of July, 1911.

C. H. WILSON,

Attorney for Defendant.

[Endorsed]: Filed July 18, 1911. Southard Hoffman, Clerk. [29]

At a stated term, to wit, the July Term A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 28th day of August, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, Judge.

No. 15,143.

FRED WHITSETT

vs.

BALAKLALA CONSOLIDATED COPPER CO.

Order Granting Motion to File Amended Complaint.

Plaintiff's motion to file an amended complaint

herein came on this day to be heard and after argument by counsel for both sides was submitted, and being fully considered, it was ordered that said motion be and the same is hereby granted. [30]

*In the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.*

FRED WHITSETT,

Plaintiff,

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,

Defendant.

Demurrer to Amended Complaint.

Now comes the defendant above-named and demurs to the amended complaint of the plaintiff herein, and as grounds for demurrer states and alleges:

I.

That said amended complaint does not state facts sufficient to constitute a cause of action.

II.

That several causes of action have been improperly united in said amended complaint, that is to say: A cause of action to recover damages for the alleged failure and neglect of the defendant to provide the plaintiff with a safe place in which to labor has been improperly united with a cause of action for the alleged negligence of the defendant in failing to provide a careful and competent man, called the

“missed-hole” man, whose duty it was to ascertain if this defendant’s mine was free from danger and to locate, mark and report all unexploded charges of powder, and both of said causes of action have been improperly united with a third cause of action for the alleged negligence of the defendant in sending the [31] plaintiff to work in a place which was alleged to have been known by this defendant as being dangerous for the reason of there being unexploded charges of powder in said place of work.

III.

That several causes of action have not been separately stated in said amended complaint, that is to say: A cause of action to recover damages for the alleged failure and neglect of the defendant to provide the plaintiff with a safe place in which to labor has not been separately stated from a cause of action for the alleged negligence of the defendant in failing to provide a careful and competent man, called the “missed-hole” man, whose duty it was to ascertain if this defendant’s mine was free from danger and to locate, mark and report all unexploded charges of powder, and both of said causes of action have not been separately stated from a third cause of action for the alleged negligence of the defendant in sending the plaintiff to work in a place which was alleged to have been known by this defendant as being dangerous for the reason of there being unexploded charges of powder in said place of work.

IV.

That said amended complaint is uncertain, inasmuch as it does not appear therein, nor can it be

ascertained therefrom, what was the proximate cause of the accident and injury complained of.

V.

That said amended complaint is uncertain, inasmuch as it does not appear therein, nor can it be ascertained therefrom, whether the accident and injury complained of was proximately caused by the alleged negligence of the defendant in failing to [32] furnish the plaintiff with a safe place in which to work, or by its alleged negligence in failing to employ a competent "missed-hole" man, or whether the same was caused by the alleged negligence of this defendant in putting the plaintiff to work in a place that was known to be dangerous.

VI.

That all that part and portion of the amended complaint relating to or setting forth any cause of action other than the alleged failure and neglect of this defendant to exercise ordinary care in providing and maintaining a reasonably suitable and proper place for the plaintiff to perform the labor described in the amended complaint, is barred by the provision of Section 340 of the Code of Civil Procedure, inasmuch as the original complaint filed in this cause set forth no cause of action to recover damages except a cause of action based on the alleged negligence of this defendant in failing to provide and maintain a reasonably safe, suitable and proper place for the plaintiff to perform the work described in the amended complaint, and that the accident described in the amended complaint occurred on March 9th, 1909, and the amended com-

plaint was not filed until August 28th, 1911, more than one year after the occurrence of the accident and injury complained of.

VII.

That said amended complaint is uncertain, inasmuch as it does not appear therein nor can it be ascertained therefrom, how, in what manner, or to what extent plaintiff was greatly bruised, broke, damaged, injured and hurt in his body and mind and limbs, or how, or in what manner, or to what extent plaintiff was thereby, or at all, made sick, sore, lame and disordered, or how or in what manner plaintiff has been disabled for life or incapacitated or rendered unable to perform [33] manual, or any other, labor, or how or in what manner the injuries alleged in said amended complaint do or will permanently, or at all, affect or impair the health or mind or strength of the plaintiff or have permanently disabled him.

VIII.

That said amended complaint is uncertain, inasmuch as it does not appear therein, nor can it be ascertained therefrom, what portion of the sum of Seven Hundred and Fifty Dollars (\$750.00) was expended for medical attendance, or what portion for nurse hire, what portion for medicines, or what portion for hospital expenses.

WHEREFORE, this defendant prays that the amended complaint of the plaintiff herein be dismissed without leave to amend.

Dated this 1st day of September, 1911.

C. H. WILSON,
Attorney for Defendant.

Receipt of a copy of the within demurrer to amended complaint hereby acknowledged this 1st day of September, 1911.

C. S. JACKSON, and
W. M. CANNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Sep. 5, 1911. Southard Hoffman, Clerk. By W. B. Maling, Deputy Clerk. [34]

At a stated term, to wit, the November term A. D. 1912, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 2d day of January, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

**[Order Overruling Demurrer to Amended Complaint
and Denying Motion to Strike.]**

No. 15,143.

FRED WHITSETT

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation.

Defendant's demurrer to the amended complaint and motion to strike out heretofore heard and submitted being now fully considered, and the Court having rendered its oral opinion thereon, it was ordered, in accordance therewith, that said demurrer

be, and the same is hereby, overruled and that said motion be and the same is hereby denied. [35]

*In the District Court of the United States for the
Ninth Circuit, Northern District of California.*

FRED WHITSETT,

Plaintiff,

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,

Defendant.

Answer to Amended Complaint.

Now comes the defendant above-named, and for its answer to the amended complaint of the plaintiff herein admits, denies, states and alleges as follows, to wit:

I.

This defendant admits each and every allegation, matter and thing contained in paragraphs one (1), two (II) and three (III) of plaintiff's amended complaint, except that this defendant has no information or belief upon the subject sufficient to enable it to answer the allegations of the complaint in that behalf, and, placing its denials on that ground, denies that on said ninth day of March, 1909, the plaintiff, as such chuck-tender or helper to the driller, was engaged in the work of assisting operating a drill, or any other machine or appliance, in a tunnel, or elsewhere, in said mine for this defendant, or otherwise.

II.

This defendant expressly denies that it failed and neglected, or failed or neglected, to exercise ordinary, or any, care in providing and maintaining, or providing or maintaining, a safe, suitable and proper, or safe or suitable or proper, place for plaintiff to perform his labor, as set forth [36] in said amended complaint, or otherwise or at all, and failed and neglected, or failed or neglected, to provide a careful and competent, or careful or competent, man, or that this defendant had in its employ at that, or any, time a man known to this defendant to be unreliable and careless, or unreliable or careless, whose express, or any, duty it was to locate, mark and report, or locate or mark or report, to the on-coming shift unexploded charges of powder, or to at all locate or mark or report or determine the safety of the place where they, or any employee or employees of this defendant, were to work in, or particularly in this, that on the evening of the said 9th day of March, 1909, or on the evening of any other day, or at all, when the plaintiff and his driller, Frank Whitsett, his brother, or when the plaintiff, or any other person, went on their, or any shift on that, or any, evening, or while he or they were so, or at all, engaged in working, as in the amended complaint alleged, or otherwise or at all, in helping operate a drill at the face of the, or any, tunnel where plaintiff was required and directed, or required or directed, by this defendant to work in pursuance of said, or any, employment, plaintiff and his driller, or plaintiff or his driller, or any other person, were ordered and directed, or ordered or directed, by this

defendant to complete an unfinished hole on the face of said, or any, tunnel, or elsewhere, left so by the retiring, or any, shift. In like manner denies that in obedience to said, or any, order of this defendant the plaintiff and his driller, or the plaintiff, or any other person, undertook the completion of said, or any, hole under this defendant's directions, or otherwise or at all, or while so, or in any manner, engaged the drill was so, or in any manner, operated by the plaintiff [37] and his driller, or by the plaintiff and any other person that it ran into and exploded, or ran into or exploded, a charge of powder, then, or at all, or any, times theretofore unknown to the plaintiff or his driller, or to any person, or of which this defendant was charged with knowledge and notice, or knowledge or notice thereof, which knowledge or notice thereof this defendant failed and neglected, or failed or neglected, to communicate to the plaintiff or to his driller, or to any person.

III.

This defendant denies that it then had in its employ, as in the amended complaint alleged or otherwise or at all, a man designated as the "missed-hole man," whose express duty it is or was to examine the place where the on-coming shift is or was to work to ascertain its safety, and/or whether or not the same is or was free from danger, and/or locate, mark and report, or locate or mark or report, to the on-coming shift all unexploded charges of powder, if any. Denies that this defendant, though it had ample, or any, time and opportunity, or time or opportunity, so to do, failed and neglected, or failed

or neglected, or did not use due, or any, care to mark or report to plaintiff's on-coming shift said, or any, unexploded charges of powder. In like manner denies that this defendant then and there, or then or there, carelessly and negligently or carelessly or negligently, performed its duty in that, or any, behalf leaving plaintiff to believe that a proper, or any, examination of said, or any, place where plaintiff was directed to work, as in the amended complaint alleged, or otherwise or at all, had been made, or that the same was free from danger, or safe to pursue the work of completing the unfinished hole [38] plaintiff was ordered and directed, or ordered or directed to do. In like manner denies that the, or any, "missed-hole man," then in this defendant's employ, whose duty it was to locate unexploded charges of powder or report, as in the amended complaint alleged, or otherwise or at all, was careless and incompetent, or careless or incompetent, or known to be so by this defendant, or that he was addicted to drink, or any other, habit. In like manner denies that said, or any, powder so exploded, as in the amended complaint alleged, or otherwise or at all, fractured the plaintiff's skull, fractured his right, or other, arm, or greatly, or at all, bruised, broke, damaged, injured and hurt, or bruised or broke or damaged or injured or hurt him in his body and mind and limb, or body or mind or limb, or that plaintiff became, or was thereby, or at all, made sick, sore, lame and disordered, or sick or sore or lame or disordered, or has so remained or will so, in any manner, remain for his natural life, or for any period, or that by reason of

said, or any, injuries the said plaintiff has been disabled for life, or for any time, or at all, or incapacitated and rendered, or incapacitated or rendered, unable to perform manual, or any, labor, which is his only, or any, means of living, except by charity. In like manner denies that said, or any, injuries, so, or at all, sustained do or will permanently, or in any manner, affect and impair, or affect or impair, the health, mind and strength, or health or mind or strength, of the plaintiff, or have permanently, or at all, disabled plaintiff ever since he received the said, or any, injuries. In like manner denies that plaintiff has suffered great, or any, pain of body or anguish of mind as a result, or at all, [39] or that by reason of said, or any, injuries said plaintiff has been damaged in the sum of fifty thousand dollars, or in any other sum or amount, whatsoever. In like manner denies that by reason of said, or any, injuries the plaintiff has been further, or at all, damaged in the sum of seven hundred fifty dollars (\$750.00), or in any other sum or amount whatsoever, for medical attendance, nurse hire, medicines and hospital expenses, or for medical attendance or nurse hire or medicines or hospital expenses, or that he is still under the care of the, or any, doctor.

IV.

Further answering, this defendant alleges that it was not guilty of any carelessness or negligence whatsoever, whereby the plaintiff was hurt or injured or damaged, as in the amended complaint alleged or otherwise or at all.

V.

For a further and separate defense herein, this defendant alleges that any cause of action in plaintiff's amended complaint contained based on the alleged failure and neglect of this defendant to provide a careful and competent "missed-hole man" was not pleaded or alleged until the filing of plaintiff's amended complaint herein, more than one year after the accident and injury complained of, and that as to said cause of action, the same is barred by the provisions of Section 340 of the Code of Civil Procedure.

VI.

For a further and separate defense herein, this defendant alleges that it was not guilty of carelessness, negligence or improper conduct, as in the amended complaint alleged, and says that the injuries therein described, if any [40] there were, were caused by the fault and negligence of the plaintiff.

VII.

For a further and separate defense herein, this defendant alleges that it was not guilty of carelessness, negligence or improper conduct, as in the amended complaint alleged, and says that the injuries therein described, if any there were, were the result and due to the plaintiff's encountering obvious or known risks and dangers incident to the work in which he was engaged and which had been and were assumed by him in his contract of employment.

VIII.

For a further and separate defense herein, this defendant alleges that it was not guilty of carelessness, negligence or improper conduct, as in the amended

complaint alleged, and says that the injuries therein described, if any there were, were caused by the fault and negligence of a coemployee of the plaintiff.

WHEREFORE, this defendant prays that the amended complaint of the plaintiff herein be dismissed and that it have judgment for its costs and disbursements most wrongfully sustained.

Dated this 9th day of February, 1912.

C. H. WILSON,
Attorney for Defendant. [41]

State of California,
City and County of San Francisco,—ss.

E. B. Braden, being duly sworn, deposes and says: That he is an officer, to wit, the General Manager of Balaklala Consolidated Copper Company, a corporation, the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and, as to such matters, that he believes it to be true.

E. B. BRADEN.

Subscribed and sworn to before me this 10 day of February, 1912.

[Seal] CHARLES EDELMAN,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires April 9th, 1914.

Service of the within Answer to Amended Complaint and receipt of a copy thereof is hereby ac-

40 *Balaklala Consolidated Copper Company*

knowledged this 10th day of February, 1912.

C. S. JACKSON and

W. M. CANNON,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 10, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,

Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and
assess the damages against the defendant in the sum
of Five Thousand (\$5,000.00) and no/100 Dollars.

JOHN T. FOGARTY,

Foreman.

[Endorsed]: Filed May 23rd, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [43]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Defendant.

Judgment on Verdict.

This cause having come on regularly for trial upon the 16th day of May, 1912, being a day in the March, 1912 Term of said Court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein, William A. Cannon and C. S. Jackson, Esqs., appearing as attorneys for the plaintiff, and Charles H. Wilson Esq., and Messrs. Chickering & Gregory, appearing as attorneys for defendant, and the trial having been proceeded with on the 17th, 21st, 22d and 23d days of May, all in said year and term, and evidence oral and documentary upon behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Five Thousand (\$5,000.00)

42 *Balaklala Consolidated Copper Company*

and no/100 Dollars. John T. Fogarty, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that Fred [44] Whitsett, plaintiff, do have and recover of and from The Balaklala Consolidated Copper Company, a private corporation, defendant, the sum of Five Thousand (\$5,000.00) Dollars, together with his costs in this behalf expended, taxed at \$183.50.

Judgment entered May 23, 1912.

JAS. P. BROWN,
Clerk.

By W. B. Maling,
Deputy Clerk.

A True Copy. Attest:
[Seal]

JAS. P. BROWN,
Clerk,
By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed May 23d, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [45]

*In the District Court of the United States for the
Northern District of California.*

No. 15,143.

FRED WHITSETT

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY.

Clerk's Certificate to Judgment-roll.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 23d day of May, 1912.

[Seal]

JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 23d, 1912. Jas. P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [46]

In the District Court of the United States for the Northern District of California, Second Division.

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

THE BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on regularly for trial on Wednesday, the 15th day of May, 1913, before Honorable WILLIAM C. VAN FLEET, Judge of the above-entitled court, sitting with a jury, the plaintiff in this action appear-

ing by his attorneys, William M. Cannon, Esq., and C. S. Jackson, Esq., and the defendant appearing by C. H. Wilson, Esq., its attorney.

A jury was thereupon impaneled and sworn to try the case and the following proceedings were had and testimony taken:

That on May 15th, 1912, and while said jury was being impaneled, and in the presence of the other jurors, during the examination of N. S. Arnold, a talesman, on his *voir dire*, by William M. Cannon, Esq., attorney for plaintiff, who subsequently sat as a juror in this cause, the following proceedings were had: [47]

[Proceedings Had on May 15, 1912, While Jury Was Being Empaneled.]

N. S. ARNOLD (on his examination as to his qualification as a juror):

Q. Have you any connection either as a stockholder or otherwise with an indemnity company, or organization for the purpose of insuring people against personal injuries?

Mr. WILSON.—I object to that question as immaterial.

Mr. CANNON.—I do not think it is immaterial. I would like to state why I asked the question.

The COURT.—What is the reason?

Mr. CANNON.—The reason is—

Mr. WILSON.—I object to the reason being stated.

The COURT.—I am asking for it.

Mr. CANNON.—In this case there is certain in-

demnity insurance against this kind of accident, and the insurance company is defending, through its own counsel, this action, therefore, I have a right to inquire—

Mr. WILSON.—I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

The COURT.—I will develop what the fact is. I will instruct the jury that they pay no attention to anything of that kind. I am bound to know the theory on which the question is asked, when it is objected to especially. That is why I asked the reason.

Mr. WILSON.—We insist on the error.

The COURT.—You have your right to reserve your exception. I overrule your objection.

Which ruling defendant now assigns as

ERROR NO. 1. [48]

[Motion that Jury be Discharged, etc.]

Mr. WILSON.—We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT.—The motion will be denied: I will instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact.

Which ruling defendant now assigns as

ERROR NO. 2.

Mr. CANNON.—Q. Have you any connection, either as a stockholder, or otherwise, with any indemnity company such as I have described?

Mr. WILSON.—We insist upon our objection.

The COURT.—I overrule the objection.

Mr. WILSON.—I will take an exception.

The COURT.—They have a right to inquire into facts of that kind. It might affect a juror's fairness, and it might turn out that some of them were stockholders in some such company.

Mr. WILSON.—The Supreme Court of this State has decided otherwise.

The COURT.—The objection is overruled.

Which ruling defendant now assigns as

ERROR NO. 3.

That the jury, being impaneled and sworn to try the case, the following proceedings were had, and testimony taken:

[Motion that Plaintiff Elect Between Two Causes of Action, etc.]

Mr. WILSON.—If your Honor please, before the opening statement in this case is made, I desire to make a motion that the plaintiff at this time now elect between the two causes of action set forth in the complaint. The complaint, in the fourth paragraph, reads as follows: [49]

“That the defendant failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for plaintiff to perform his said labor aforesaid; and failed and neglected to provide a careful and competent man, and had in their employ at that time a man known to the defendant to be unreliable and careless, whose express duty it was to locate, mark and report to the on-coming shift unexploded charges of powder.”

Your Honor will observe that those two causes of

action are stated in one count in the complaint; that the failure to furnish a safe place in which to work, and the failure to furnish a competent coemployee, each is a separate cause of action; the violation of each one or either of those duties would give to the plaintiff a cause of action and they each are separate delicts.

The COURT.—The motion will be denied. I will not permit it to go in as a double cause of action, Mr. Wilson. I understand the theory of the complaint, and I shall instruct the jury that they can have but one recovery.

Which ruling defendant now assigns as

ERROR NO. 4.

[Motion that Plaintiff be Restricted in His Proof to Particular Cause of Action, etc.]

Mr. WILSON.—We make the further motion, if your Honor please, that in this case the plaintiff be restricted in his proof to the particular cause of action stated in this complaint, to wit, that the injury here complained of was proximately caused by the negligence of the defendant in failing to provide a careful and competent man known as a missed-hole man or a missed-shot man.

The COURT.—I will deny your motion formally at this time, but I will restrict the evidence within the lines that are deemed to be competent and proper when it comes to it. [50]

Mr. WILSON.—With your Honor's permission we will take our exceptions.

Which ruling defendant now assigns as

ERROR NO. 5.

[Testimony of Lawrence Whitsett, for Plaintiff.]

To support the issues on his part to be maintained, the plaintiff thereupon called as a witness, LAWRENCE WHITSETT, who, on being duly sworn, testified as follows:

I reside in Glendale, Oregon, and am a brother of Fred Whitsett, and Frank Whitsett, now deceased. My father, James Whitsett, and my mother, Susie Whitsett, are now living in Glendale. My brother, Ed Whitsett, is living. On March 9, 1909, at the time of the happening of the accident and injury complained of, I was working in the mine close to the place of the accident between what is called 3 and 4. I had worked in the mine a little over 3 months. 3 is a drift running towards 4. While there I worked only in 3 and 1. 3 and 4 at the time of the accident had come together, thus forming one continuous tunnel. Mr. Bishop was superintendent and Mr. Grenegar was day foreman and did day work. B. Hall was night foreman. Myers was night shift boss. Myers and B. Hall took night shifts. I know Nat Yokum. To my knowledge Nat Yokum worked in the mine 3 months before the accident and was a missed-hole man. A missed shot is a shot that does not go off with a round of holes. A round of holes are those drilled before a shot in the top, center and bottom of a face and are about 10 in number drilled from 4 to 5 feet in depth and are driven ahead in the face. The top holes drive straight in, and the rest of the holes point straight down, giving them a chance to [51] break the rock out. The night

(Testimony of Lawrence Whitsett.)

foreman, B. Hall, directed the driving of holes. The holes were driven with a Burleigh drill machine worked by 2 men, each, a machine-man and a chuck-tender. The machine-man would crank and point the drill and the chuck-tender would put water in the hole and change the drill. In the course of their work they would sometimes change places. It was the duty of Yokum to find and fire missed holes. I have worked in mines about ten years. During the three months prior to the accident that I worked for defendant I was night machinery repairer for about a month. After that I was a machine-man, running a drill. Where there remains an unexploded blast or what is called a missed hole, it is dangerous to drill another hole in the vicinity, or to drive into it. The danger is that an explosion most generally happens. On the evening of the accident I went to work about eight o'clock and in about two and a half hours the accident took place. I was about sixty feet away from where my brothers were working, back towards the mouth of the main tunnel. I could see the point where they were working. When I was up there earlier in the evening, I saw that the Burleigh drill was set for a lifter, that is, for boring a hole in a drift to take up the bottom and make it level. At that time my brothers were working. At the time of the accident I was back at the point of my own work. I heard a loud explosion; I went up there. I found Frank dead and Fred hurt pretty bad. I did nothing. I went on out of the mine and I did not see Fred until after they brought him

(Testimony of Lawrence Whitsett.)

out. I saw him at the mouth of the tunnel. At that time he was conscious a little while and then he was unconscious. He did not say anything to me. He was then taken to the hospital in a wagon. I went to the hospital the next day. I saw the wagon in which he was taken [52] but I do not know whether it was a dead-wagon or a spring-wagon. There was a cot in the wagon and he was on the cot. When I first saw my brother after he was taken out of the mine he was bleeding and black with smoke and dirt and his clothing was all torn up. The next day when I saw him at the hospital he was conscious. He remained there at the hospital about 4 months. I visited him frequently for the first three weeks I remained there. I then went away and came back in a month or so and remained with him for about ten days. During the three weeks that I remained at the hospital he was at times conscious; at other times he was not. He appeared to be suffering pain and very frequently made outcries and moans. His arm and leg were bandaged up so that I could not see the extent of his injuries. Afterwards I saw my brother at Glendale when he got home. He was there in the train and was brought to the house in a rig and carried in. He was in bed for the three months that I remained there. He had the doctor and his mother looked after him. I then went away and came back at the end of about three months. He was then getting around on crutches a little. Before the accident my brother was strong and rugged. He was about 22 years of age and weighed about

(Testimony of Lawrence Whitsett.)

160 pounds. He is not at all like that now.

Q. State what the manner and appearance of your brother at the present time is physically and mentally, as compared with his condition at and before the time of this accident.

Mr. WILSON.—I object to that upon the ground that it is incompetent, irrelevant and immaterial and calling for the opinion of the witness and no proper foundation laid.

The COURT.—The objection is overruled.

Mr. WILSON.—I take an exception. [53]

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 9.

Mr. CANNON.—Go on and state fully.

A. He does not seem to have the mind *had* had before the accident.

Mr. WILSON.—Let me move to strike out the answer as not responsive, and incompetent, no proper foundation laid for it.

The COURT.—I will overrule your motion.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 9a.

Since the accident my brother has worked around the home quite a lot, mostly helping my mother in the kitchen, but he has done no heavy labor of any kind. He does not seem to have much strength. I have observed a change in his condition.

Q. What change have you observed?

(Testimony of Lawrence Whitsett.)

A. He does not seem to me to be the man he was physically or mentally.

Q. Can you describe it any more particularly than that? A. No, sir.

Prior to the accident I was acquainted with Mr. Hall, the night foreman.

Prior to the accident I discovered at several different times missed shots in the place where I was working, and reported them to Mr. Hall. I should judge that I discovered four or five missed holes and reported them. Mr. Hall was my immediate superior. My work did not bring me in connection officially with the missed-hole man. I have seen the missed-hole man Yokum [54] under the influence of liquor and several times have seen him drunk while on duty. Yokum drank considerable. He was absent from work several times and when he returned he would be intoxicated. I told Mr. Hall that I had found missed holes at several different times around different places where he had told me to set up. I did not say much to him about Yokum, nor did I mention to him anything about the condition that I had seen Yokum in at different times. During the night while Hall was on duty, he would be going around among the men seeing if they were working and telling them where to work. Yokum would be looking after missed holes and pulling down rock. They both covered the same territory. Our work was not at the same place every night. At the time of the accident my brother was receiving \$2.75 a day and working every day in the month. He

(Testimony of Lawrence Whitsett.)

paid his expenses out of that, 75¢ a day for board and \$1.50 a month for bunkhouse room; hospital fees \$1.00 per month, which included the privilege of 10 weeks in the hospital at Coram. Two shifts worked 8 hours each in the 24 hours. The night shift worked from 8 o'clock in the evening until 5 o'clock in the morning, with an hour off for lunch. When the shifts went off the blasts that were ready would be exploded and then the missed-hole man would make his examination and the miners would not commence drilling again until after his inspection. At the point of the accident they were starting to run a cross-cut from 3 to 4. (Witness is shown photograph.) That is a photograph of a machine and the point where they started to cross-cut and also of the place where the accident occurred. The photograph was taken the night before the accident. I recognize in the photograph Frank Whitsett, who is marked with the letter A, Fred Whitsett, who is marked with the letter B, B. Hall, who is marked with the letter D, and Enos Wall, who is marked with the letter E, and the Burleigh drill, being marked C. Between [55] the time when this photograph was taken and the time the accident occurred, I do not know that any work had been done at that place other than drilling the previous round of holes. The machine there is what is known as the Burleigh drill. It is run by air.

Mr. WILSON.—We will admit, if your Honor please, that this is photograph of the drift or cross-cut, whichever it may be, where the accident oc-

(Testimony of Lawrence Whitsett.)

curred, taken the night preceding the accident, and that it may be used for the purpose of illustration as a diagram, with such modification of conditions as may be shown, to have taken place after the taking of the photograph, as may be shown by the evidence.

The work at the place of the accident was carried on by candle light. (The witness' attention is called to a diagram drawn on the blackboard.) The space between the two main lines up and down represents the tunnel, which has been called 3 and 4. The cross represents the place where the work was being done at the time of the accident. Below and to the left are two cross-lines, the space between which is supposed to represent a cross-cut. It was at this point that I was working at the time of the accident and at that time Enos Wall was working at the place marked B. At those times when I called the attention of Mr. Hall to the missed holes, of which I have testified, he did not ask me to do anything with reference to them, but gave me another place to work. At the time of the accident and for about 10 years prior thereto my father had been in poor health, and he is in poor health at this time and unable to work. My mother is also very poorly.

Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally?

[56]

Mr. WILSON.—I object to the question as irrelevant, incompetent and immaterial, not the proper proof of damages in the case, and calling for the

(Testimony of Lawrence Whitsett.)

conclusion of the witness.

Mr. CANNON.—I will modify the question. What was the financial condition of your parents at the time of the death of one brother and the injury to the other?

Mr. WILSON.—The same objection.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 14.

A. They were very poor. My brother Frank had contributed to their support since he was big enough to work for wages. At the time of the accident he had been working underground as a miner for three years, and Fred for three months.

Cross-examination.

My mother and father live in the town of Glendale in a small house built on a lot owned by my brother. My father does not own any real property, nor does he have a bank account. He is 56 years old and my mother about 53. My brother Ed Whitsett is the oldest; he works as bridge carpenter and contributes to the support of my father and mother. Next comes Milton. He works in a block-signal gang on the railroad. Then I come. I was born in 1883 and have been mining for ten years, and contribute to the support of my father and mother and always have done so since I have worked. After me there came Fred and Frank, twins. There is one living sister and one deceased. I worked in the defendant's mine three months prior to the accident, but [57] did

(Testimony of Lawrence Whitsett.)

not work afterwards. Frank and I began work there at the same time. Before that he had worked in Siskiyou County off and on for three or four years. In mining a drift runs along the course of the vein, and a cross-cut runs through or across the vein. The cross-cut at the place where the accident occurred had not progressed at all at the time of the accident; I mean that they had not taken out any rock there. I was at that place about an hour before the accident, and Fred and Frank were there. I then went to work at the place marked 4, which is about 60 feet away. I was operating a drill at the time. I was slabbing off, that is, knocking down ore off the side of the drift. I stood in the drift most of the time that I was slabbing off the cross-cut. Enos Wall was working at the place 3. During the time that I worked on this shift I did not go to the place 2 on more than one occasion. I began work at the place 4 and worked there approximately an hour and a half and then went to the place 2 and was there probably 5 minutes. While I was there my two brothers Fred and Frank were there. I do not remember anyone else being there. I then returned to the place 4 and continued work up to the time of the explosion. After I returned to the place 4 neither of my brothers came to me, nor did I have any communication with Enos Wall. The distance between 3 and 4 is about 30 feet and 3 is about half way between 4 and 2. The night of the accident was my first shift in this drift. While I had probably passed the point 2 before the accident, I had never

(Testimony of Lawrence Whitsett.)

had occasion to stop there until the time that I have testified to, when I was there about 5 minutes, an hour or so before the accident. When I was at the place 2 before the accident there were probably 8 or 9 top holes already drilled. It was the practice to drill about a dozen holes in [58] the face of the drift or cross-cut and then load them with powder, the number of holes depending somewhat on the size of the face or nature of the ground. The blast is exploded as the men go off the shift. The men work shifts of 8 hours with intervals of 3. In the intervals the powder smoke, caused by the explosions, would clear away. The explosion would cause the dirt and rock to fall down in large quantities. I have known Yokum about 5 years. Several times while I worked there I saw Yokum drunk at the entrance into the mine. The last time was about two weeks before the accident. He was then staggering around. I never noticed Yokum intoxicated when any of the superiors were around. There were probably about 100 men that went into the mine on each shift. The drill-men would work at 25 or 30 different faces in the mine on each shift. Some of these faces were a considerable distance away from others. Yokum was the only missed-hole man at the mine, so far as I know. While I worked there I saw Yokum go on shift intoxicated probably 4 or 5 times. He got his liquor at a little place about a mile away. My father has been ill with Bright's Disease about 10 years. My mother has been ill about 8 years. I do not know what is the matter with her. I do not know how

(Testimony of Lawrence Whitsett.)

much money my brother Ed contributed to the support of my father and mother. I contributed \$15.00 or \$20.00 a month.

Redirect Examination.

When the men gathered at the entrance of the mine preparatory to going on shift, the foreman was at the candle-house where all the men went to get candles. B. Hall directed the miners where to work. I was never told, while working in that mine, to examine for missed holes. A night bookkeeper there checked off the men as he gave out the candles. [59]

Recross-examination.

We went by numbers. We had checks. We got our tag and presented that as we went on shift. We got the tags from a board alongside the candle-house and handed them to the bookkeeper, who was inside, and he gave out the candles.

[Testimony of Enos A. Wall, for Plaintiff.]

ENOS A. WALL, called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I reside at Medford, Oregon. At the time of the accident I was running a drill in defendant's mine. I knew the Whitsett brothers, also B. Hall and Yokum. I knew Mr. Grenegar, foreman, and Mr. Bishop, superintendent of the mine. At the time of the accident I was working within 30 feet of Fred and Frank Whitsett, at the place marked on the diagram 3. They were working at 2; Lawrence Whitsett at 4. The machine at which Fred and Frank

(Testimony of Enos A. Wall.)

were working had been set up the night before. They were just starting a cross-cut. B. Hall assisted in setting up the machine. The photograph shows the point at which the cross-cut was commenced. The photograph is a flashlight taken the night before the accident. They drilled, I think, 5 holes the night before the accident. None of those were shot off that night, but the work of drilling was continued by the next shift. I saw the Whitsett boys working at 2 on the night of the accident. The only lights they had were candles. Between the time I went on shift and the happening of the accident, I went to get a drink, and coming back stopped to talk with the Whitsett boys. B. Hall was not there at that time. He was there at about half-past eight and remained probably five minutes. I was running my machine when the explosion occurred. It put out the lights for one hundred feet around. I lit my candle as soon as I [60] got over there. I found Fred about 8 feet from my machine. That would be about 22 feet from where they were working. I did not find Frank, but I assisted in taking Fred out of the mine. I took him by the arm and helped him up until another fellow came and assisted me. We went out from No. 4 through No. 3 and used the skip at No. 3 and so down to the main tunnel and out of the mine. He was partially unconscious until we got him outside and kept saying, "You hurt my arm." When we got outside he kind of went away in a stupor. I put him on a cot in the bunkhouse, washed his face the best we could and bandaged it and got a

(Testimony of Enos A. Wall.)

wagon to take him to the hospital, which was about 5 miles away.

Q. What kind of a wagon did you take him in to the hospital?

Mr. WILSON.—I object to that as immaterial, no part of the *res gestae*, no element of damage in this case, and incompetent.

The COURT.—I overrule the objection.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 18.

A. It was a deadX wagon. I did not go with him to the hospital but walked down with his brother. I saw him the next morning. His head was bandaged all over. I stayed in town 7 days and saw him every day at the hospital. The first three days he hardly knew us. After that he seemed to gain consciousness a little, gained right along. After the seven days I went down every Saturday to see him until he commenced to get better. Then I would go once in two weeks. The last time I saw him was the 4th of July. [61] He was in bed then and they had removed the bandages from his head. I did not see him again for four months, when I saw him in Medford. He then walked with a cane and was lame in one leg. At the times I called on him at the hospital he would moan once in a while and holler when he moved. I know Yokum. He was a missed-hole man. Before the accident Yokum quite often got under the influence of liquor. About ten days or two weeks prior to the accident I was looking for steel and I ran

(Testimony of Enos A. Wall.)

on him one evening when he was lying on a pile of muck asleep. Prior to the accident I probably saw him under the influence of liquor once a week.

Q. At any time that you saw him under the influence of liquor, where was the foreman, if you know?

A. He never stayed close to the foreman; he managed to be in another part of the mine all the time. When the men were going into the mine at the beginning of a shift they would get their candles at the office from the bookkeeper. At such times the foreman would be there. Yokum would get his candles at the same time as the other men. I should judge that there were about 180 or 200 men on each shift. After a round of shots had been fired the drifts were cleaned out entirely and then subject to inspection by the missed-hole man. That would be done before a shift would go to work at that same place again. We had a clean place for the machine.

Cross-examination.

My work was at place 3, which was 30 feet away from the place 2 where the accident happened. The photograph was taken March 8th, the night before the accident. These men represented in the photograph, except Hall and myself, worked at that place [62] on the evening of March 8th. The machine was in the position indicated in the photograph when I went to the place 2 on the evening the photograph was taken. I did not see the day shift working at 2 on the day preceding the accident, but from the holes that were there one would naturally think

(Testimony of Enos A. Wall.)

that work had been done there. There were about five more holes than there were when the Whitsett boys quit the morning before the accident. They usually drill 12 holes in the face of a cross-cut of that character before they load the dynamite. I saw Yokum under the influence of liquor about a week before the accident. He was lying on a muck pile in the mine. I guess it was about a week before that I also saw him under the influence of liquor at the bunkhouse. I saw him on several different occasions, but I did not keep a memorandum of the times.

Mr. CANNON.—Mr. Wilson, it is not disputed that Frank Whitsett was killed in this accident, is it? I have not shown his death absolutely.

Mr. WILSON.—No, that is not disputed; it is admitted.

The COURT.—I want to ask you one question. You spoke of an occasion when you saw Yokum sleeping on a muck pile; was or was not that during the working hours of his shift?

A. It was during working hours.

[Testimony of Ed Whitsett, for Plaintiff.]

ED WHITSETT, called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I am a brother of Fred and of Frank Whitsett. At the time of the accident I was at Glendale and did not see my brother Fred until about June 20th. I then saw him at the hospital [63] in Coram. He was in bed. Afterwards he sat out on the porch with a nurse. He remained there until about the 8th of

(Testimony of Ed Whitsett.)

July. I remained at Coram until he left and was at the hospital every day and saw him wash his leg every day. They kept the leg open and washed it out every day and they scraped the bone right up and down to get off the broken bone. My brother suffered pain during all that time and on one occasion they put him under the influence of an anaesthetic. The bone was scraped for a distance of between 7 and 8 inches. About July 8th I took my brother home to Glendale where he was put to bed and had the attendance of a physician. I remained there about a week and then went to work. During the time that I was there he appeared to be suffering pain all the time. I went back home as often as I could, sometimes once a week and sometimes once a month. After about a couple of months my brother could get about with a pair of crutches, but it was close to a year before he could get about without either crutch. He then used a cane, but I do not know how long he used the cane. Before the accident he was strong and stout and weighed about 160 pounds. He now weighs about 130.

Q. What is the appearance of your brother Fred now as compared with his appearance before the accident?

A. Nothing at all; no comparison whatever.

The COURT.—Q. How do you mean—do you mean that he appears so much better now or worse?

A. Worse.

Mr. CANNON.—Q. What appears to be his mental condition now with respect to memory and his men-

(Testimony of Ed Whitsett.)

tality generally as compared with what he was before the accident? [64]

Mr. WILSON.—I object to that upon the ground that it is incompetent under the pleadings, irrelevant, and that there is nothing of that character alleged in the pleadings.

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 20.

A. Nothing at all. The mind isn't like it was before at all. My brother kept books for a man in Roseberg last summer and he is now working on the ranch raising chickens and a little garden. So far as I know, he has done no heavy work since the accident. Prior to his death my brother Frank contributed to the support of his father and mother.

Cross-examination.

I could not state exactly the date or time when I saw my brother Frank give any money to my father or to my mother. I have seen him the same as I have seen myself and all the rest of us pay the bills. When we got home we four boys went together and paid the grocery bills, the medicine and doctor bills and everything.

Q. Your mother has been ill for a long time, has she? A. She has for about eight years.

Q. What is the trouble with her?

A. Well, change of life for one thing.

Q. And what else?

A. Other ailments; I could not say what. That

(Testimony of Ed Whitsett.)

has been the principal thing, so the doctor told me.

Q. You don't know except what the doctor told you? [65] A. That is all I know about it.

Mr. WILSON.—I move to strike it out as hearsay.

The COURT.—Let it stand.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 21.

My mother is about 54 years of age and my father about 56. My age is 33. I have contributed about \$20.00 a month to the support of my father and mother.

[Testimony of Fred Whitsett, for Plaintiff.]

FRED WHITSETT, being called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I am the plaintiff and a brother of Frank Whitsett, who was killed in an accident. I went to work for the defendant January 27th, 1909, and worked continuously up to the time of the accident. I was a machine-man's helper, working on the night shift. The boss of that shift was B. Hall. The foreman of the day shift was Grenegar. On the night before the accident a photograph was taken at the place where the accident happened. Before the photograph was taken I had not done any work at that particular point. The drift at that time had not been started. My brother Frank and B. Hall and myself set up the machine, as shown in the photograph, and it was in that place at the time of the explosion. Prior to the machine being set up and prior to the

(Testimony of Fred Whitsett.)

taking of the photograph I do not know whether any recent drilling had been done at that point. After the photograph was taken my brother and I went on drilling until half-past four in the morning, and I think we drilled five holes. We went to work again at that place on our next shift, which was at eight o'clock the following night. [66] B. Hall was there at the time and told us to go ahead and finish that round of holes and shoot the round when we went off in the morning. At that time there were two holes and part of another to drill, to finish the round. The drill was in the partly drilled hole and B. Hall told us to go ahead and finish that hole and we drilled in, I guess, 15 or 20 minutes and it exploded. At that time my brother was tending chuck and I was running the machine, I heard the report; that is about all I know. The next thing I remember was when the doctor came from Coram. I was in bed some place. I was conscious probably one quarter of the trip from the mine to the hospital. After I reached the hospital I should say I was conscious about half of the time for the first six or seven weeks. During that time I do not know what the treatment was. After that time I noticed that my arm was stiff, my left leg was bent back and I could not straighten it for about two months and a half. I found this place here was fractured and right along here also (pointing) and there are scars all over my head. My hearing is not as good as before the accident. My arm was broken, but it is all right now. It was three or four months before I had any use of

(Testimony of Fred Whitsett.)

it and since the injury it has not been as strong as the left arm. Pieces of rock were shot into my head and the doctor had to get them out. They caused the scars. When I left the hospital I could not hardly do anything to help myself, nothing at all. I had to have somebody dress me and move me in the bed and out and pack my meals to me. After I went home it was seven or eight months before I was able to be out. It was in December before I got out on the porch by myself. I suffered a whole lot of pain while I was in the hospital and after I left the hospital. I always suffered when they dressed my leg. There is a large scar there now about 7 inches long. Pieces of rock were taken out of that wound and the bone was [67] affected, small pieces of bone came out of the wound for nearly two years after the accident. I cannot sleep very well nights at present. I have to sleep almost sitting up, because if I lie down in bed my head gets dizzy. I should judge that my left leg is now about half as strong as my right leg. If I walk too far it gives out on me. Once or twice since the accident I have attempted to do manual labor, but I could not make it. At the time of the accident I was receiving \$2.75 a day. My brother Frank was getting \$3.25. There is a large scar in my right arm just above the elbow where the break occurred. (Here the witness bared his body to the jury that they might see his various marks and scars.)

My brother Frank and I were twins. We were 22 years of age at the time of the accident. While I was

(Testimony of Fred Whitsett.)

in the hospital there were seven operations performed on me. There was one operation that occupied from 8 in the morning until 6 o'clock in the evening, removing the bones from my leg. During that time I was under an anaesthetic. The next longest operation was 3½ hours. My expenses at the hospital at Coram were \$248. The doctor's bill at home, I guess, was three or four hundred dollars. I paid \$1.00 a week, which was deducted from my wages and entitled me to receive ten weeks at the hospital at Coram.

Cross-examination.

The debt to the hospital of \$248.00 was incurred after the expiration of 10 weeks. I have never seen the bill of the doctor at Glendale. He did send one bill, which was about \$300. I worked for the defendant six weeks prior to the accident with my brother Frank operating the drill and tending chuck. [68] The first work that we did at the place of the accident was on the evening the photograph was taken. I think we drilled five holes that night. After we came off shift the day shift went on and they continued the drilling, so that when we went on shift the night of the accident there were two holes and a part of the third yet to drill. Those were the lifters. In the meanwhile no blasts had taken place in this face. It was the custom of the mine to drill all the holes—a dozen ordinarily—and then load them with powder and set them off when the men went off shift. The purpose of that was, first, because they could not drill with holes loaded with safety; and second, to

(Testimony of Fred Whitsett.)

have the blasts go off at one time so that they would not interfere with work at other places. I do not know the appearance of a missed hole. I never saw one. I know that the purpose of putting the powder in is to blast the rock and I have assisted in loading the holes at various times; and a missed hole is a loaded hole that had not gone off; in other words, one in which the powder has not exploded. Where the blast or charge in a hole goes off, it breaks up the rock around the hole.

Q. And where a charge does not go off, it does not break up the rock? That is true, is it not?

A. I guess it is.

There were a great many faces in this mine, and we worked first one place, then another, drilling holes and loading the holes with explosives. I did not know that after the blasts were exploded a man came along with a bar and barred down the loose pieces of rock. I did not see him do that. I know that the muckers removed the pieces of rock that fell down on the ground. I did not see any mucking done at the place where the accident occurred. When we went to work there, there was a very small [69] amount of muck on the ground, probably about 4 inches in depth, scattered over the floor of the tunnel, but there was none against the face that I know of. I suppose that the mucker scraped it away. It was done when we got there.

Q. How far back from the face was the muck straight back?

(Testimony of Fred Whitsett.)

A. Probably halfway across the tunnel; it is hard to tell.

By the tunnel I mean the depth and between that muck and the face, where we were working at 2, there was no muck, none near the face. The holes are ordinarily drilled 4 or 5 feet deep and 4 or 5 sticks of dynamite are placed in each hole. Sometimes they put just a little mud on top of them. There is a cap and from the cap a fuse runs, a separate fuse for each hole. When we go away after we have loaded the shots and lighted the fuses, the fuses are sticking out, one out of each hole. The length of the fuses differs; some of them are 5 or 6 feet long. On the evening of the accident we got to this face probably 10 minutes after 8, but we had to wait for steel and it was 10 o'clock when we got the drill working. When I first went to the place 2 I remained there probably 5 minutes, and during that time I looked at the holes that had been drilled by the day shift and I saw those that had been drilled by us. When we got to work there was a hole started but not completed. The holes are started with quite a large drill and drilled 7 or 8 inches and then a little smaller drill is used, and that is what we were waiting for. When they came I took four of them, I think, over to the place 2. They weighed about 25 pounds. At times I operated the drill. To do that I turned the crank or valve that let in the air, and also turned the crank that threw the [70] drill into the face of the hole. That was all that it was necessary to do in the drilling part. That does not require any great strength.

(Testimony of Fred Whitsett.)

When I worked as chuck-tender my duties were to take the drill out of the chuck whenever necessary and to put in another drill. The drill was tightened in the chuck with a monkey-wrench; and besides *was tightened in the chuck with a monkey-wrench; and besides* that, it was my duty to pour water into the hole while the drill was in operation. That work did not require any great strength.

Q. Did you observe there when you went to work that evening, either when you first went there about 8 o'clock, or the second time when you went there about 10 o'clock, a missed hole alongside of the one that you began drilling? A. No, sir.

Q. Did you see any drilled hole there?

A. I did not.

Q. About how high from the bottom of the drift was this hole, the lifter, that you were drilling?

A. I should say about 6 inches.

When I brought the steel I put a drill in the chuck. The mouth of the chuck was then about 6 inches above the ground. Before I put in the new drill I took out the old one. In order to do this I stooped over so that my head came within about a foot of the face and of the place where we were drilling. My face was then about 18 inches from the ground and I could see the face of the wall perfectly. When I went for the steel I left Frank at the machine and when I came back he was still there waiting for me. I knew Yokum and had seen him about the mine a few times. I was his duty to bar down and look for missed holes. I knew that missed-holes sometimes occur. I had

(Testimony of Fred Whitsett.)

seen him barring down.

Q. You have seen a missed hole, of course? [71]

A. I don't remember whether I did or not.

Q. You don't know whether you ever did or not?

A. No, sir.

I never saw Yokum intoxicated.

Mr. CANNON.—We now offer in evidence, if your Honor please, the American Tables of Mortality to show the expectation of life of these plaintiffs.

Mr. WILSON.—I have an objection, if your Honor please: We object to the tables on the ground that under the facts shown in this case they are incompetent, irrelevant and immaterial, and that it is necessary for one relying on a mortality table, to prove the life expectancy of a person to show that he belongs to the class of persons from which such tables are made.

The COURT.—Objection overruled.

To which ruling the defendant then and then excepted and now assigns the same as

ERROR No. 25.

Mr. CANNON.—The expectancy at the age of 22 is 40.85 years; the expectancy of life of the father, 56 years of age, is 16.72; and the expectancy of the mother at 54 is 18.09.

Mr. CANNON.—The plaintiff now rests.

[Motion to Strike Certain Testimony.]

Mr. WILSON.—Now, if your Honor please, we move to strike out all of the testimony in this case as to the incompetency of the man Yokum. We move to strike out all of the testimony in this case as to

his being intoxicated, or seen intoxicated.

Mr. WILSON.—And in the Reardon case we move that an order of nonsuit be entered upon the ground that the plaintiff has failed to substantiate the allegations of negligence in this case. Further, upon the ground that the evidence fails to show [72] any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; and further, upon the ground that it does not appear from the evidence in this case that the defendant negligently or carelessly omitted or failed to furnish the deceased, Frank Whitsett, with a safe place in which to perform his work.

[Motion for an Order of Nonsuit.]

And in the Fred Whitsett case we make the further motion that an order of nonsuit be made and entered therein upon the ground, first, that the plaintiff has wholly failed and neglected to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; second, upon the ground that there is no evidence in this case that the missed-shot man or the man Yokum was habitually intoxicated, or that his services were rendered inefficient by reason of any intoxication upon his part, or that the defendant knew, or had reason to know of his habits of intoxication; nor is there any evidence to show that at the time of the accident and injury complained of, or immediately before that time, Yokum inspected the place where the accident occurred and at that time was under the influence of liquor or inefficient in any way or manner, whatsoever; and on the third ground that

(Testimony of Ira L. Greninger.)

there is no evidence in this case to show that by any act or omission on the part of the defendant the plaintiff was furnished with an unsafe place in which to work.

The COURT.—I will deny the motion to strike out the evidence indicated and likewise the motions for nonsuit.

To which rulings the defendant then and there accepted, and now assigns the same as

ERROR No. 26, ERROR No. 27. [73]

[Testimony of Ira L. Greninger, for Defendant.]

And thereupon the defendant, to maintain the issues herein on its part, called as a witness IRA L. GRENINGER, who, on being duly sworn, testified as follows:

I am an assistant chief engineer for a mining company and engaged in mining. I was employed by the defendant between two and three years and left them July 9th, 1911. I was foreman of the Balaklala Mine. I know Fred Whitsett and in his lifetime I knew Frank Whitsett. I employed them. I remember the accident in this case. I directed the Whitsett boys as to their work at the place of the accident. I remember the taking of the photograph. Prior to the time the photograph was taken there had been one round drilled and blasted in this cross-cut. It broke the cross-cut out from 3 to 3½ feet in depth. In the photograph the drill isn't pointed toward the cross-cut. The cross-cut appears behind Frank Whitsett in the photograph. At the time of the accident he was running a machine. The duties of the

(Testimony of Ira L. Greninger.)

machine-men were to set up their drills when going on shift, or ordered to do so, and drill holes according to the customary manner, and load them with powder and blast them. It was the duty of all machine-men to look for missed-holes in order to protect themselves in cases where the missed-hole man was not for any reason able to find them, either being limited in time or from being covered with muck. I do not consider that it was the duty of chuck-tenders to blast missed holes, but it was the duty of each man in the mine to look for and avoid missed holes. A missed hole is one that has been filled with powder and failed to explode. At this place the appearance would be that of a round hole, very much the same as the end of a hole that had not been loaded at all. Such a missed-hole would be readily seen, if it was above the muck. [74] If it was below the muck it would be harder to detect. In drilling lifters, the bottom holes in a drift, they are commenced a little above the level and extend quite a distance below the level of the drift in order to get the bottom of the drift on a level, and after the holes above have been once located and assurance made that they have been destroyed, it is not the practice to raise the muck in a depth as low as the bottom of the holes. We ascertain that the lifters have been exploded by testing the ground with a drill or piece of steel. With it we find that where a hole has been exploded the ground is broken and fractured, while if there has been no explosion the ground is hard.

Q. Who made such a test in this mine?

(Testimony of Ira L. Greninger.)

A. The bottom hole, the machine-men were doing that sort of work.

I have had experience in other mines; in the Blue Ledge Mine, Siskiyou County, California; in the Greenback, in Josephine County, Oregon, and Cherry Hill Mine, in Siskiyou County, California, and various others.

Q. Is there, or is there not, a custom among miners and drill men as to looking for missed shots?

A. There certainly is a custom for the protection of the miners themselves for them to look out for missed holes.

There were approximately 50 machine-men employed at this mine at the time of the accident and they were engaged in drilling about 25 different faces. In the mine I should say that there were altogether 50 or more faces. The blasting was done at the time the shift left the mine on account of the fumes of the powder making it impossible for the men to stay in the mine after the shots were discharged. If a machine-man discovered a missed hole, he was either moved to some other point for the [75] time being, or the machine was taken down and the hole blasted, depending on the local circumstances. It would be impossible to say how long before the Whitsett brothers went to work on this face that the other blast had been made. It was the duty of the muckers or laborers to remove the muck or broken rock after a blast. They usually did this the next shift after the blast. I knew and employed Yokum. During the time that he was em-

(Testimony of Ira L. Greninger.)

ployed there I never saw him intoxicated, nor had any complaint ever been made to me about his being intoxicated. I have no distinct recollection of giving any instruction to either Frank or Fred Whitsett relative to their duty to look out for unexploded holes.

Q. Did you ordinarily on employing men give such instructions?

A. I did so instruct them and I always instructed my shift bosses working under me to call their attention to those things.

Cross-examination.

The drift from which the cross-cut 2 was being driven had been cut through for a month or a month and a half prior to the accident. In my capacity as foreman I was supposed to go to every part of the mine. It was my custom to, several times during the day, and I became familiar with every part of the mine. That is the reason that I can identify the photograph to my own satisfaction. I do not know how long before the accident the previous shots had been exploded at that particular place, from the fact, as I have stated before, the machine was moved from one point to another, and sometimes the face would be left with no one working in it from one to two or three days. In this case I do not know how long it was before the last round was [76] finished or exploded. Yokum's duties were to look for missed holes and to bar down loose pieces of rock and to explode missed holes when he found them. B. Hall had charge of the underground work at night under

(Testimony of Ira L. Greninger.)

my direction. After a round of shots were exploded on any particular face, the workmen would be removed to another face on the next shift, and the muckers would get to work cleaning away the muck from the place where the explosion had taken place.

Q. At what point of time would Mr. Yokum go around to examine for missed holes after the muckers had cleared away the muck?

A. It would depend on circumstances. He was supposed to be looking for the holes from the time he went on shift, when perhaps, no muck had been cleared away, from noon-time until evening.

Yokum had an eight-hour shift and was supposed to be looking for missed holes and barring down rock and firing missed holes all the time. We blasted every day shift somewhere. There were about eight or ten rounds at a shift. There was a missed-hole man for each shift. The operation of clearing the muck from any one place required a shift and sometimes more than a shift, so that a round of holes blasted at the end of one shift might not be cleared away by the end of the following shift. Sometimes the muck might remain in its place over a shift. The best time to examine the face was after the muck had been removed, but the exigencies of mining sometimes required the missed-hole man to examine the face before all the muck had been removed. If the missed-hole man found a face clear in the course of his day's work and it was his part of the mine to look after, he examined [77] the face for the missed holes. If it happened that the face had muck in it,

(Testimony of Ira L. Greninger.)

he would examine as far down as possible at that time and go on to the next place. Sometimes the drillers would be set to work at a face before the muck had been entirely cleared out. As a matter of fact, there would be no danger of hitting a missed hole in the upper part, which was always uncovered and plain to be seen, so that the missed hole would be detected without any trouble. The machine was moved down in the lower holes after the muck had been taken out. Sometimes the muck would lie halfway up. If the missed-hole man came to a place where the muck had not been entirely removed, it would be his duty to make an examination as far as possible. That would leave the bottom of it unexamined. As to whether or not the missed-hole man would go back after the muck was removed to further examine the same face, would depend on whether he was ordered to do so, or had time to cover those grounds. If he did not have time, it was the duty of the machine-men to make the examination. The machine-men were supposed to take that precaution for their own protection. It was his duty to examine the whole face every time he went to work.

Q. Then what was the object of having a missed-hole man?

A. It was this: We had in this mine many men employed as muckers, not acquainted with powder and would not know it if they saw it. These bar men and missed-hole men were employed by me for the purpose of protecting those men and also leaving the upper part of the face clean, so that a machine

(Testimony of Ira L. Greninger.)

could be set up when a machine had finished somewhere else.

My idea in employing the missed-hole men was to protect the inexperienced men. We did not have any written or printed rules or regulations of any character at that time. *There were* [78]

Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the mine in the underground working of that mine?

Mr. WILSON.—I object to that question as immaterial and not cross-examination.

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 29.

A. There were no rules in regard to the working of the mine, the underground working, except as I have stated, the ones that I laid down.

The rules that I laid down were by verbal instructions to my shift bosses and to the men themselves.

Q. To what shift boss did you ever give any instructions or direction that the missed-hole man was only hired for protection to inexperienced men?

Mr. WILSON.—We object to that on the ground that it is not in itself an instruction, and it is incompetent, irrelevant and immaterial, and not cross-examination. The witness has stated what were the duties of the missed-hole man, and it is entirely immaterial whether this witness communicated those duties to anyone else or not.

(Testimony of Ira L. Greninger.)

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 30.

A. My giving instructions to three or four hundred men at the same time, having that many under me, I cannot call to mind any one instance or any instance by itself. [79]

I do not remember having communicated the exact words to any shift boss, but it was tacitly understood between us. I mean by that, such men as were employed as shift bosses understood it would be folly to employ a man to protect another person who did not know any more about the business than he did, and the machine-man was supposed to know how to handle powder, load holes and look out for his own protection, and it would be folly to hire a man of the same kind to look after it. We worked together with those ideas in my mind and no friction, so I assume they worked according to my ideas on those matters. I have no distinct recollection of ever communicating those rules to a shift boss at any certain time.

Q. You are assuming that the shift boss knew that? Knew what you had in your mind without your stating it to him?

A. I am assuming that we worked together to that end and understood each other.

I never saw Yokum drunk or under the influence of liquor. I have no recollection of having asked Mr. Hall to discharge him because of his drinking

(Testimony of Ira L. Greninger.)

proclivities. I knew that Yokum had the reputation of being a drinker when he was in town. It had not been communicated to me by Hall that Yokum had been hiding away from his shift boss when he was in the mine. I did not request Hall to get rid of him.

Redirect Examination.

I communicated my rules to my bosses verbally. As to the men, I often told them when I hired them what they should do and also instructed the shift bosses to tell them. The shift bosses in undertaking the position knew their instructions because when they were hired they were instructed what their duties should [80] be. We had no more missed holes in that mine than they do in others. I would say one per cent of the holes might have missed; that is an approximation. There are several causes for a hole to miss. One is, the removal or jerking out of the fuses from one hole by the discharge of another; by the rock flying from the first hole and pulling the fuse out of the second. It might be through a defective fuse or a defective cap or primer, or it might happen by the hole being wet and the primer or fuse becoming damp before discharge, and so not exploding. So far as Yokum is concerned, what I heard about his drinking was at the town Coram, about 4½ miles from the mine.

[Testimony of John M. Williamson, for Defendant.]

JOHN M. WILLIAMSON, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

(Testimony of John M. Williamson.)

I am a physician and surgeon.

Mr. CANNON.—We will admit Dr. Williamson's qualifications.

On Friday last I made a physical examination of Fred Whitsett. I found that he had sustained at one time or another a personal injury and that certain scars on his leg had resulted.

Q. With reference to the leg that you examined, state whether or not, in your opinion, the plaintiff, Fred Whitsett, has a good functional use of that leg.

A. I would consider that that leg is in condition for good functional use. With the exception of a scar on the under side showing a considerable amount of suppression, the condition of the leg, as far as development is concerned, is, in my opinion, satisfactory. There does not appear to be any muscular atrophy, and the various movements of the leg that he made in my presence were normal. I refer to contraction and extension. He complained [81] of his hearing. I held a watch about three inches from each ear and he claimed he could not hear it. His statement that he could not hear is what is called a subjective symptom; that is, a symptom which is claimed by the patient and which the observer has to accept or refute. In speaking with him, I spoke in an ordinary tone and I did not observe any great impairment of hearing, or any impairment at all, as far as ability to listen to conversation is concerned.

Mr. CANNON.—We do not claim any great impairment of hearing, Mr. Wilson. We claim that it

(Testimony of John M. Williamson.)

is impaired to some extent. I did not find any impairment of his mentality. He answered my questions very intelligently.

Q. Did you, or did you not, discover anything in the physical condition of Fred Whitsett that would interfere with his ability to labor at the present time?

A. No. In my opinion the man is able to perform such labor at the present time.

The ability of a man to do work depends upon his general physical condition. I observed the general physical condition of Fred Whitsett when I examined him, although I did not examine the functional action of the heart, nor the condition of his liver or kidneys. I did not find in the examination of Fred Whitsett anything that would interfere or prevent his doing the work of the operator of a Burleigh drill in a mine. In my opinion, the man would be capable of operating such a drill. I think he could also work as chuck-tender at such a drill.

Q. Doctor, what is the nature of Bright's Disease and what is the full effect of that disease upon the duration of life?

A. The term Bright's Disease is a conditional one. [82] It was formerly used to designate a condition that was marked by the presence of albumen in the urine. Now, there are several conditions of the kidney that might give rise to albuminuria, as we call it. The condition may be acute or it may be chronic. It may involve the blood vessels of the kidney, and in fact the blood vessels of the entire

(Testimony of John M. Williamson.)

physical system. It would come under the old classification of Bright's Disease. On the other hand, it might only involve the tubules, the secreting portion of the kidney, which is instrumental in separating that portion of the blood which passes out through the urinary tract as urine, or it may be due to a diseased condition of the connective tissue which adjoin the blood vessels and tubules. Any one of those terms could be put under Bright's Disease. I infer from what you tell me that this patient probably has a chronic condition of the tubules of the kidney, what we call a chronic neuphritis, meaning an inflammation of the kidney. A chronic neuphritis may drag along for quite a period, but a man subject to it is certainly a bad risk. He would not be considered or accepted by any life insurance company. If, in addition, a man has a degenerated condition of the blood vessels of the kidney, that would imply a degenerated condition of all the arteries, and he is on the edge of dissolution, we might say, at any time, because he could have a hemorrhage of the brain. That is quite a common termination of what is known as Bright's Disease. The term Bright's Disease has come to be employed in a popular way to designate almost any disease of the kidneys.

Q. What, in your opinion, would be the tendency on the period of life of a woman 54 years of age who had for 8 years been suffering from a change of life and other things, one-half the time or thereabouts bed-ridden? [83]

(Testimony of John M. Williamson.)

A. If she was bed-ridden half the time, I should consider that her physical condition was not good.

Cross-examination.

The change of life in a woman is considered to a certain extent a critical time. There is a remote possibility that she might die as a result of conditions arising during that period. After she passes that time, very frequently she regains her health and lives to a good old age. During the time there are mental conditions that are sometimes very serious. From the fact alone that a change of life is taking place, a physician could not determine whether the length of a woman's life would be shortened or otherwise.

The fact that Bright's Disease had existed for ten years would indicate a chronic condition. An acute attack of Bright's Disease is one that might either have a fatal termination or a recovery might take place within a very short time, or it might turn into a chronic condition. When the disease has become chronic a physician may in some cases approximate how long the patient will live. I do not, however, consider the mere statement that a patient has Bright's Disease and has been suffering from it for 10 years sufficient data upon which to draw any conclusion as to the duration of a patient's life.

I never operated a Burleigh drill in a mine. I examined Fred Whitsett's head during the examination that I made and found a number of small scars and powder-marks.

Q. Did you find one of the scars, the principal

(Testimony of John M. Williamson.)

scar in his head, still soft?

A. Well, I would not say it was soft. I found a slight linear depression underneath the scar. [84]

I consider the bone in good condition at the present time.

Q. You don't know, do you, you are not in a position to say from the examination which you made, as to whether there is or may be any sort of pressure or any improper condition resulting from that on the brain?

A. It is a matter of a little more than three years since the accident, I understand.

Q. About that.

A. I would consider that the chances for anything in the future occurring would be very remote.

If a piece of bone worked out of that scar within the last year, I do not consider that would have any effect on that portion of the head underneath the scar. I examined the plaintiff's right arm. I could not say that I found any weakness, but I found the muscles on that side to be not quite up to the par as compared with the other side. The muscles were flabby to a certain extent. I found that the bone differed somewhat in contour above the right elbow, but he had enough muscular tissue to mask, to a great extent, the character of the thickening; to the best of my judgment the bone was fractured above the elbow, but has made a very good repair and in good line. As the matter stands at the present time the muscles on the right arm are not as well developed as those on the left. It

(Testimony of John M. Williamson.)

is, however, just as good an arm as many a man has that is going around with perfect health, with a normal arm which he is not using in physical work. It is not an arm that would enable him to perform the maximum amount of labor. With respect to the plaintiff's leg, I found a very deep depression on the inner side of the thigh, indicating that there had been a deep wound there, which involved to some extent the tearing of the muscles. The leg was slightly smaller [85] than the other, half an inch in circumference. In my opinion, that leg would be capable of sustaining exertion on account of the position of the scar. That would indicate that the injury had been received mainly between the two planes of muscles which respectively one upon the front and the other upon the back of the thigh. There did not seem to be any impairment of the group of muscles in front and very little of those on the back. I would not consider that the fact that the bone had been scraped for quite a period would weaken the leg, because nature very frequently rebuilds bone that is lost in that manner, and the bone might be just as strong, and even more bulky, than it was before the accident. The tendency, of course, would depend entirely upon the amount of bone lost and the amount of repairs that had taken place, that is, of compensatory repairs.

Q. Now, in this case of a person strong and rugged, sustaining such an accident as you have heard described, and the effect of which you have seen to some extent, who has never since that accident

(Testimony of John M. Williamson.)

regained his weight by 30 pounds, and complains of weakness and exhaustion, and inability to lie in bed, compelled to sit up at night, to sit up in bed the night, propped up on his pillow, that is a constant condition, if he lies in bed subjected to attacks which almost blind him, confusing sounds in his head, and such things, in a case of that kind, the natural processes of repair, would they be interfered with or hampered to any extent by that condition?

A. Well, you have carried that into the realm of subjective symptoms.

Q. Well, assume that these subjective symptoms exist?

A. I do not consider that they would interfere with the repair of the bone. [86]

If all these subjective symptoms that you have stated are admitted as existing, I would not call the man in healthy condition. Assuming that those conditions exist, I would not call him a sound man.

Redirect Examination.

From my own examination of the plaintiff in this case I would call him at the present time in fairly sound condition. It is my opinion that in his case the tendency would be toward further improvement in his health. In my opinion the reason why the muscles of the plaintiff's arm are flabby and in not as good condition as the other arm is that they lack use. If they were used, there would be a gradual enlargement, restoration of the muscles to normal capacity and normal bulk and improvement in strength. It is a common thing for broken bone

(Testimony of John M. Williamson.)

to work out in the process of healing. It indicates that the bone, which has been devitalized, is passed off by natural processes.

Recross-examination.

The coming out of the bone would not indicate a prospective necrosis or deadening of the bone. It might indicate a necrosis, and it is the method of nature when bone becomes necrosed to throw out a healthy barrier or layer around it, and, as it were, pry it off from it. Then again, on the other hand, the piece of bone might be detached entirely from the main bone at the time of the injury. It would simply lie in the tissue and act as a foreign body and the natural tendency is for foreign bodies to travel in the line of least resistance and work out. My opinion as to the condition of Mr. Whitsett is based upon the objective symptoms alone that I found. [87]

[**Testimony of Christa B. Hall, for Defendant.**]

CHRISTA B. HALL, called as a witness on behalf of the defendant, on being duly sworn testified as follows:

I am the man who has been mentioned as B. Hall and was employed by the defendant as night-shift boss at the time of the accident. I am familiar with the place where the accident occurred. I know Fred Whitsett and I knew Frank in his lifetime. I do not know whether the Whitsett boys or the day shift set up the machine. I do not remember that I assisted in setting it up. I know Yokum. I saw the

(Testimony of Christa B. Hall.)

place where the accident happened probably an hour before its occurrence. I did not at that time, or any time, tell the Whitsett boys, or either of them, to begin drilling in a hole that had been partly drilled, and I did not at that time see a missed hole in the face of that drift, or about there anywhere. I had never seen Yokum intoxicated while at work, or in the mine, nor had I ever seen him intoxicated while I was at the candle-house and the men were getting their checks and candles. At no time was there any complaint made to me about Yokum's being incompetent through drinking, nor any complaint made at all. I did not at any time ask Mr. Grenegar to discharge Yokum, and I did not ask Grenegar, or any other person, to discharge Yokum because he was intoxicated while on duty. I had the right to discharge anybody under me in my shift, including Yokum.

Cross-examination.

Grenegar never asked me to discharge Yokum, or say anything about discharging him, nor did he ever say anything about Yokum's drinking, or that he was not a good man and that I should discharge him.
[88]

Q. Did you not say to Mr. Grenegar that you did not want to discharge him because they would give you an Italian, or someone who could not speak English, and you would have to go with him from place to place in the mine and show him what to do, and that would make you back-track on your work—did you not say that?

(Testimony of Christa B. Hall.)

A. Not to Mr. Grenegar.

Q. To whom, if anybody, did you say that?

A. I could not place. I don't know whether I said it or not.

I did not say it to Mr. Bishop. I took no orders from him. I do not remember to have stated to Lawrence Whitsett or Enos Wall since this trial began and here in San Francisco, that they wanted me to discharge Yokum because of his drinking habits and that I did not want to discharge him because they would give me an Italian or someone who could not speak English, and I would have to go with the Italian and show him the things that he had to do and he would make me back-track on my work. I had heard of Yokum drinking and I saw him once drinking a little on the mine premises.

Q. Was he under the influence of liquor at that time? A. You would tell he was drinking.

I did not know that he was in the habit of hiding away from me in the mine or on shift. When I was at the place where the accident occurred, about an hour before the accident, Fred was there. Sometime between 8 and 10 o'clock on that evening I took him to another part of tunnel No. 4 to show him where to set up when he had finished the other two holes and a part of another that was left to be done at the place where the accident occurred. On the evening of the accident I did not put the [89] Whitsett boys to work at the place 2. I came along there afterwards. I did not look to see what was done there. They knew what to do. I made no ex-

(Testimony of Christa B. Hall.)

amination of the face there at all. I did not see Yokum around there that evening, although he was in that neighborhood the night before. I do not know how long prior to the accident he was in that part of the mine. There was a shift boss under me by the name of Meyers.

Redirect Examination.

Q. You say that you heard of Yokum drinking. What time did you hear of his drinking?

A. He was down town and I heard he was full. That is all I heard.

He was at Kennett, 10 miles away. I stated that I had seen him drinking at the mine on one occasion; that was at the bunk-house and before the accident. I don't know whether it was a month or six weeks or 10 days before. That is the only occasion that I ever saw him drinking or under the influence of liquor.

Recross-examination.

Yokum was not there long after the accident, maybe two weeks. The mine was shut down about five weeks after the accident. After the accident Mr. Grenegar ordered me to put Yokum on the other shift. [90]

[Testimony of John H. Meyers, for Defendant.]

JOHN H. MEYERS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a miner and have been for 22 years. I am acquainted with the defendant's mine and was employed there as shift boss on the night shift at the

(Testimony of John H. Meyers.)

time of the accident. I worked with Mr. Hall. I would go to one end of the mine and begin and Mr. Hall began at the other and we would work toward each other until we met, placing the men and setting up the machines and showing the muckers where to work. I know Fred Whitsett and in his lifetime, Frank. I am acquainted with the place where the accident happened. I was there some time every night. I directed that the machine be set up there. Just one round had been taken out of that cross-cut. The muck was pretty well cleaned up. There was nothing to interfere with their setting up. I could see the face tolerably well. I did not examine carefully, just walked up and looked it over. I could see no reason why they should not set up there. I did not discover a missed shot. The drills are of different diameters according to the length. The hole is started at something like three inches and drilled a foot or a foot and a half. Then a second drill of smaller diameter is used and another foot and a half drilled, and then a still smaller drill. After a hole is drilled it is readily seen. It is very plain in the face of the drift or cross-cut. After a round of holes are drilled they are loaded with dynamite, which is tamped in with a stick, and each charge is then connected with a cap and fuse. The fuses are cut at such length as will make the holes go off in rotation. After the shooting the muckers go in and clean it out. There was a little loose muck lying around the bottom, but [91] nothing to interfere with the process of setting up the machine. Where a missed

(Testimony of John H. Meyers.)

shot appears its appearance depends a good deal on where it is, whether it is in the center or the outside. A missed hole on the outside would leave a bunch of ground, which would indicate that the hole had not broken it. It would leave a mound of material unblasted, not broken, and it could be seen the moment you walked in. It would be possible for the rock to so break that it would conceal a missed shot, and that is the way they come at times to miss discovering them, because they are concealed. I knew Yokum. His principal duties were to bar down loose ground for the muckers, and, if he saw any missed-holes, to shoot them, or see that they were shot. It was not his duty to remove the muck.

Q. What was the duty of the machine men with reference to discovering missed holes?

A. The machine-men—I don't know that you would call it a duty. Of course, we did all we could about missed holes and things like that.

The custom there was the same as in any other mine. Machine-men are naturally always on the look-out for missed holes.

Q. I want to know, is it or is it not the custom in mining for machine-men to look out for missed holes?

A. Every place where I worked they did.

And they did in this mine. Some chuck-tenders looked for missed holes and some did not. That is a thing that is so thoroughly understood among miners that there is no such thing as duty attached to it and no such thing as instructing them concerning it. Independently of instructions, most all of the

(Testimony of John H. Meyers.)

drill-men and chuck-tenders look for missed-holes. I knew Yokum. I had [92] never seen him at or in the mine under the influence of liquor, nor did I ever see him on his work in that condition. No complaint was ever made to me about Yokum. When I told the Whitsett boys to set up their machine at this place, I did not see a missed hole in this face, nothing to make me suspicious of anything like that. When a missed shot is discovered it is usually fired. Sometimes if there is only just a little powder left in the hole they take a stick and pick it out. We used a gelatine powder in that mine, which comes in sticks. It needs a hard concussion to explode it. I have no positive knowledge that Yokum inspected the face of this cross-cut before the accident. I looked at the face when I set these men up there and saw nothing.

Cross-examination.

I directed the Whitsett boys to go to work at this point the night before the accident. I knew that a cross-cut had been ordered at this particular place by Mr. Grenegar, so that the men were set to work at that place really indirectly under the orders of Grenegar. All my orders came from him. There has been one round fired there a shift or two before I set the Whitsett boys at work at that place. I do not know who blasted that round. I remember a man by the name of Piper did some drilling on that first round. On the night of the accident I was at that place shortly after the shift started. I saw the drill was in position, but whether they were drill-

(Testimony of John H. Meyers.)

ing or not, I do not remember. When a machine had been set up in a face of a particular cross-cut, that machine was used by the succeeding shifts until the holes were ready to be fired. It was then taken away to a safe place. After the shots were fired and the [93] muck had been cleared away the machine would be taken back and set up again for a new round. (On being shown photograph.) I know for a positive fact that this photograph was taken as that bar set there in that cross-cut, but I could not tell by the photograph the direction in which the main drift proceeded. I am not an expert on photographs. I could not say how long I had been employed in the mine at the time of the accident. I was there only six weeks altogether. Yokum was there all that time. His duties were to bar down rock and to examine for missed holes and shoot them, and if he had any extra time he would do other work. When I went to the point of the accident on the evening of the accident the muck was pretty well cleared away. At the time of the accident I heard a shot as I was going down the man-way. I knew there was an accident because nobody shot there between times when the men on shift were still around. I went there. The smoke was still pretty thick. We carried one of them out and had to get a stretcher to carry the other one. I looked at the place where the blast had gone off. It was at the same cross-cut at which I had set the Whitsett boys at work the night before.

(Testimony of C. F. Yokum.)

Redirect Examination.

After the Whitsett boys had worked at this cross-cut to the end of their shift on the first night, they were followed by the day shift. That shift worked there all day.

[Testimony of C. F. Yokum, for Defendant.]

C. F. YOKUM, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I reside at Butte, Montana, and am a miner by occupation [94] and have been for the past 20 years. I was employed by the defendant at the time of the accident and knew Frank and Fred Whitsett. I was hired to bar down, and a day or two later the shifter gave me orders to look out for missed holes and shoot them when I could otherwise, have the machine-man when I could not. I had nothing to do with the muck that accumulated on the floor of the mine or drift or cross-cut after a blast. All I had to do was to examine as far down as I could and go along about my other duties, whatever they might be. Prior to the accident I examined the face of this cross-cut as far as I could.

Q. You say you examined it as far as you could. Was there anything there to prevent a complete examination?

A. Well, there was a little muck that the lifters had thrown up, and, of course, I could not examine this closely without mucking it out, and, therefore, I never stopped to do it.

Q. Was it, or was it not your duty to muck out

(Testimony of C. F. Yokum.)

at that place? A. No.

This examination was before the night shift came on to bore the second round of holes in that cross-cut. The drill was not yet set up. I did not find any missed holes there.

Q. At the time that you made that examination that you have spoken of, were you sober or intoxicated? A. I was supposed to be sober.

Q. Were you sober? A. Yes.

At no time while I was employed at this mine did I go on work intoxicated. Off shift I have had several drinks with the boys around and felt pretty good at times, but not going to work. I never went to work intoxicated or under the influence of liquor and cannot remember to have ever gone into the mine while under the influence of liquor. I never at any time gathered with [95] the men at the candle-house in an intoxicated condition, or in a condition where I was under the influence of liquor, and I never at any time while under the influence of liquor went to sleep on a muck pile in the mine.

Q. I will read you part of the testimony of Mr. Lawrence Whitsett:

“Now, you have spoken about Mr. Yokum. How long have you known Mr. Yokum?

“A. I should judge about five years.

“Q. You say that on several times during the time that you worked at this mine you saw him drunk? A. Yes.

“Q. I want you to tell me when you saw him drunk? A. Before going on shift.

(Testimony of C. F. Yokum.)

"Q. Let me take the last time you saw him prior to the accident. Where did you see him intoxicated? A. Before going on shift.

"Q. I mean at what place more exactly?

"A. At the mouth of the tunnel where the men got together to go underground.

"Q. You mean the entrance into the mine?

"A. Yes.

"Q. What made you think that he was drunk?

"A. Well, he was staggering around.

"Q. How long before the time of the accident did this occur? A. Probably two weeks.

"Q. On what day of the week?

"A. I could not say about that."

Is that true that I have read to you?

A. No, sir.

Q. Were you ever drunk or staggering around on the occasion testified to by this witness?

A. No, sir.

Q. I will continue to read his testimony:

"Q. Now, when before that, did you see him drunk? [96] A. On several occasions.

"Q. I want to know the exact occasion right back? A. Oh, I can't exactly answer that.

"Q. Every few days? A. Yes.

"Q. Then a few days before this occurrence you have mentioned, you saw Yokum drunk?

"A. Yes.

"Q. What do you mean by a few days?

"A. Oh, probably a week.

"Q. A week?

"A. Yes, something like that."

(Testimony of C. F. Yokum.)

Is that correct, is that true?

A. Well, I had been full a great number of times—feeling good to a certain extent.

Q. At the mine?

A. On the outside, among the boys.

Q. When going on shift?

A. No, not going on shift.

Q. I will read you from the testimony of Mr. Wall. Mr. Wall was testifying to Mr. Cannon:

“Q. What were the habits of Yokum during that time with reference to sobriety?

“A. Quite often he got under the influence of liquor.

“Q. What, with reference to the time he was on duty did you see, if anything, in that regard?

“A. I ran on him one evening when I was looking for steel, lying on a pile of muck asleep.

“Q. Was his candle burning or out?

“A. His candle was out.

“Q. How long before this accident happened did that occur?

“A. I should judge about two weeks—ten days or two weeks.”

Is that true? A. No, sir. [97]

I got fired about two or three weeks after the accident; it might have been less than two weeks; I know it was a few days.

Cross-examination.

As near as I can remember, I was discharged somewhere near two weeks after the accident. I was dis-

(Testimony of C. F. Yokum.)

charged the very day that I was changed from Hall's shift to Greninger. The latter discharged me. I was never asleep in the mine, intoxicated or sober, while on duty.

Q. Don't you remember an occasion when you were found there by Mr. Wall asleep?

A. No, or no other man.

My duty was coming on shift to go around and bar down the place where I thought they were going to set up the next night. I was the only man barring down. I used my judgment and figured when they would shoot the holes from the work that they were doing, and I went around and barred down according to that. The muck was not cleared away when I barred down. I made my examination just as far down as I could, as far down as the muck would permit. When I examined the place where the accident occurred, the muck was not cleared away. I examined the place the night before the accident and that night these fellows set up. I examined before they set up and went away. I could not say when the muck was removed.

Q. Now, did you come back after the muck had been taken away to examine it?

A. No, that was not my business.

Q. Was it never your business to examine after the muck had been taken away?

A. The machine-men after they came on and set up—

Q. You have not answered my question.

A. (Contg.) After they set up they are supposed

(Testimony of C. F. Yokum.)

to look out for them. [98]

I have examined the face on several different occasions after the muck had been cleared away, but where there was no machine set up. I was at that place about half an hour before the accident. Frank Whitsett was there alone, starting a hole, a lifter. The hole was in 5 or 6 inches, perhaps, and he seemed to be having trouble with it. I helped him line up the machine. The muck had been cleaned out. I did not look for missed holes at that time.

Redirect Examination.

I did not see any missed holes at any time in that neighborhood. I looked at the place where the drill entered the face of the cross-cut. There seemed to be muck there. I could not recall how much muck there was. Naturally, they cleaned away the best they could before they set up. I did not see any indication of a missed hole in that vicinity. At the time I barred down I made my inspection for missed holes. It was not my duty to look below the muck. The muckers might find a missed shot and report it, and the men who would be setting up would look out for them. Every man had to look out for himself.

Recross-examination.

Q. How did the machine-men know who were coming on to find a face of a drift or a cross-cut cleared of muck and ready for the machine to be set up; how did they know that place had been inspected?

A. They would have to take that on their own hands; as far as I could I did; I could not be all over the mine.

(Testimony of C. F. Yokum.)

From my knowledge of the manner in which the mine was run, there was no man whose duty it was especially to search for and shoot missed holes. It was more or less the duty of every one in the mine.
[99]

Q. I will ask you this: Did or did not every miner employed on those premises have to look out for missed holes? A. Why, certainly.

Q. You only know that from supposition?

A. Well, most all the mines I have worked in for the last 20 years I had to protect myself. That is generally customary among all mines.

Q. But you were instructed two days after you took that job to look out for missed holes and bar down?

A. Yes, I was instructed by the shifters, and I was working under those instructions at the time of this accident.

[Testimony of M. D. Thomas, for Defendant.]

M. D. THOMAS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I have been a miner 30 years and worked in different mines in Colorado, Montana, California and Arizona. I am familiar with the defendant's mine and was foreman there a month or six weeks before the accident. There is a custom among miners as to examining for unexploded blasts. The custom is to examine the place before a drill is set up, and if there is a missed hole to report and don't set up. The duty rests upon the man that is working.

(Testimony of M. D. Thomas.)

Q. Is there any custom in mines relative to the employment of a missed-hole man?

A. I never heard of it, except upon this occasion.

Cross-examination.

I was succeeded as superintendent and foreman of the Balaklala Mine by Mr. Greninger; he had been under me as shift boss; I left and went to another mine. [100]

Redirect Examination.

During my administration no missed-shot man was employed in this mine.

[**Testimony of W. A. Pritchard, for Defendant.**]

W. A. PRITCHARD, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a graduate of Stanford University and a mining engineer. I have been superintendent and general manager of some twenty-odd different companies located in California, Australia and Mexico. I have been engaged in that business 14 years.

Q. Is there any custom among mine owners and miners relative to the detection for unexploded blasts? A. It has always been left to the miners.

By miners, I mean those men engaged in drilling and blasting.

Q. Is there any rule relative to the employment of a missed-shot man in mines?

A. I never heard of a missed-shot man before this case.

(Testimony of W. A. Pritchard.)

Cross-examination.

I consider a chuck-tender a miner. They act as helpers and do their duties as miners. They change about in their position. The chuck-tender is waiting for a position as machine-man. The business of examining for missed holes devolves on both the machine-man and chuck-tender. Of course, the first day that a man is working as chuck-tender he would naturally be taking instructions from the machine-men, but as he works, after he has spent considerable time underground, he naturally would relieve the machine-man from some of that responsibility. The machine-man [101] orders him about. They work as companions in all the duties relative to their work and take turns about resting each other in their different duties. The machine-man teaches the chuck-tender to look for missed holes, how to drill, how to charge the holes, and to blast. It is not considered an apprenticeship, but his instruction lasts until some shift boss thinks enough of the man to make him a head man.

Q. Then when some shift boss thinks a chuck-tender has learned how to do the work of a machine-man and learned how to find missed holes, he is promoted to a machine-man, and from that time on the responsibility is on him as a miner?

A. Yes, sir. A man who did not learn about missed holes the first day he is underground ought not to be permitted to enter again.

Q. Now, you say that a missed hole is very easy

(Testimony of Edward A. Davis.)

to detect after one day's experience in the mine?

A. One man can see as much as another.

Redirect Examination.

Q. Mr. Pritchard, what would you say would be the duty of a chuck-tender who had been employed six weeks and who was able to run a drill, as to finding missed holes?

A. His duty would be to find missed-holes the same as a man who had been employed longer.

[Testimony of Edward A. Davis, for Defendant.]

EDWARD A. DAVIS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a mining engineer and have been about 25 years. I have been engaged in a large number of mines all over the Pacific Coast. [102]

Q. Is there a custom in mines relative to the duty of discovering unexploded blasts or missed shots?

A. Yes, sir, there is.

Q. And through whose agency is that done?

A. The miners. By miners I mean the two men at the drill. It is the duty of the chuck-tender to count the shots. Every round of holes fired is supposed to be counted by the men who fired the holes. Where ten or a dozen faces each contain 12 holes are exploded by the men in going off their shift, the proper method of procedure would be for them to look over the face of the drift or cross-cut, or whatever it was, after the shots had been exploded. That is the duty of the miners. It is not

(Testimony of Edward A. Davis.)

customary to place that duty upon a missed-shot man.

Cross-examination.

Where there is more than one shift during the 24 hours in a mine, the custom is as I have described, but the on-coming shift makes the examination. The object of counting the shots is that if there is a hole that is not accounted for, it is the duty of the shift to go back before quitting the mine and find the unexploded hole and fire it. It is a rare thing for there to be an unexploded hole. It does appear once in a while but it is very unaccountable. Perhaps in a hundred rounds fired you would not get more than one unexploded hole. I have never seen, as well as I can remember, where shifts were working so closely that each shift could not count its own holes. Where the distances are 30 feet apart it would be difficult to count them. I have never seen just such a set of conditions as you ask me about. According to my own experience it is the universal custom to count the shots. Where there were three cross-cuts being worked within 30 feet of [103] one another, they would be fired one round after the other, and counted. If there was no doubt about the number of holes counted, it would be proof that all were shot. If they could not get back on account of the smoke to fire a missed hole, it would be their duty to report it to the foreman. The on-coming shift begins by barring down all the loose rock they can and throwing it back for the muckers, and looking at the face with reference to setting up again.

(Testimony of Edward A. Davis.)

I have never been in a mine where they employed a special man to bar down.

Q. I am asking you particularly as to what you said about what the shift should do when they come on with reference to barring down, in a case where the barring down man is employed to do the barring down. Your testimony as to the duty of the on-coming shift in that respect does not apply, does it?

A. Yes, sir, it does still apply.

Q. How can there be any duty on the part of the on-coming shift to bar down when the barring down is done by somebody else especially employed for that purpose?

A. No, sir; in that case there would not be any duty on them because the work would have been performed already.

It is the duty of the on-coming shift to bar down, if that work has not been done, and to set up and to go to work and throw the muck back and to look over the place generally. If they had another place for the men to drill, the muckers would throw back the dirt and take it away, run it out. The drillers would not handle it. They would simply look at the face and set up with reference to the best point to drill again. [104]

Redirect Examination.

They would look at the face to see that it is all right for drilling and that everything is in good shape to go ahead. They would look over the whole face, for instance, in a case of this kind to see that there is no unexploded hole.

(Testimony of Edward A. Davis.)

Q. Now, take the case of a mine that has a large number of drifts and cross-cuts exceeding a mile or a mile and a half in length, where work is proceeding on say, 50 faces, and where each shift has a gang of drillers of 25 men operating on 25 of those 50 different faces, and where at the conclusion of each shift 10 to 15 faces are blasted, and owing to the nature of the ore it is necessary for the men to retire where they cannot count the shots, and where if they attempted to count the shots, they could not, because of the shots going off together, and other things relative to the sound of the shots, and where they could not locate the various shots that did discharge, and in a mine where the on-coming shift came in after the blast and the smoke had cleared away, whose duty was it to discover the missed-shots? A. The on-coming shift.

Recross-examination.

If there is a missed-hole man employed for that purpose in such a mine, the duty would be on both of them to look for missed holes. In the case where the shots can be counted, it is the duty of the off-going shift to go back and discover missed holes, or if they could not go back, then to report to the foreman, but it is always the duty of the on-coming shift, as a matter of self-preservation, to look over the face before starting the drill. [105]

[Testimony of F. A. Gowing, for Defendant.]

F. A. GOWING, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

(Testimony of F. A. Gowing.)

I am a mining engineer and have been since 1903. I am a graduate of the University of California. I have had experience in various mines located in Arizona, California, Nevada and foreign countries.

Q. Is there any custom in mines with reference to the duty of a drill operator to investigate or look for missed-shots? A. Yes, sir.

Q. What is that custom?

A. To trim down the faces and see whether there are missed shots left in them.

The same custom applies to chuck-tenders. It is not ordinarily the custom in mines to employ a missed-shot man.

Cross-examination.

I have done other work besides mining engineering. I have mucked and drilled, worked a mill smelter, civil engineering and underground. I have worked as a common miner about 2 years. By trimming down the faces, I mean that after a round is broken in the drift or face, it is the custom of the on-coming miners, before they set up a machine or go to drill, to trim off all the shattered rock in the faces. It is called barring down. I never worked in a mine where there was a man employed for the special purpose of barring down, and I don't know anything about the custom where there is a man employed for that special purpose. When I say that it is not ordinarily the custom to have a missed-hole man, I mean that in all the mines that I have had any experience with, they have not had such a

(Testimony of F. A. Gowing.)

man, so I do not know what the custom is that prevails in mines where they have a missed-hole man.

HERE THE DEFENDANT RESTED. [106]

[**Testimony of Lawrence Whitsett, for Plaintiff
(Recalled in Rebuttal).**]

LAWRENCE WHITSETT, recalled on behalf of the plaintiff, testified in rebuttal as follows:

In my experience in the big mines I never heard that it was the custom for the miner and chuck-tender to look out for and discover missed holes. In small mines it is the custom to count the reports. I have worked in 3 or 4 mines other than that of the defendant, where a missed-hole man was employed. I was never warned or instructed or directed in defendant's mine with reference to looking out for missed holes. I never heard of any custom in any mine with reference to the men going off shift after a round had been fired or going back into the mine immediately to look for missed holes. I have worked in 50 or 60 mines.

[**Testimony of Enos Wall, for Plaintiff (Recalled in Rebuttal).**]

ENOS WALL, recalled as a witness on behalf of the plaintiff, testified in rebuttal as follows:

I have been working as a miner 15 years. I never heard of a custom prevailing in large mines that the duty devolved upon miners to look out for missed holes. I know of a custom in large mines to have a missed-hole man. I have been employed in one mine, other than the defendant's, where they had

(Testimony of Enos Wall.)

such a man. I was never warned or given any instruction or direction by the defendant to look for missed holes. In small mines where there is one drift no cross-cuts or raises, where there is only one shot fired, it is the general custom to go back after half an hour to look for the missed shots. When the photograph was taken the camera was placed on the opposite side of the main drift, about 20 feet away from where the machine sets. It was diagonally across the drift. The dark place in the center of the picture represents the main drift. [107]

Cross-examination.

I have worked in probably 25 or 30 different mines. It was in the Bingham Canyon Mine in Utah that a missed-hole man was employed.

[Testimony of Fred Whitsett, for Plaintiff (Recalled in Rebuttal).]

FRED WHITSETT, recalled as a witness on behalf of the plaintiff, testified in rebuttal as follows:

Q. While you were working in this particular mine prior to the accident, did you ever hear of a custom to the effect that it would be your duty to look out for missed holes?

Mr. WILSON.—We object upon the ground that having worked only at one mine he could not testify to a custom, and it would be hearsay, not rebuttal.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 30a.

(Testimony of Fred Whitsett.)

A. No, sir.

I was never warned or instructed or directed to do anything with reference to looking for missed holes in that mine. At the time the picture was taken the camera was about 20 feet away from us, kind of crossways the drift. The dark place in the center of this photograph represents the main drift.

HERE THE TESTIMONY CLOSED. [108]

Charge to the Jury.

The COURT (Orally).—Gentlemen of the Jury, I will ask your careful consideration while I proceed to submit to you the principles involved that must govern you in the consideration of the evidence in this case for the purpose of reaching a verdict. And in that connection I will suggest preliminarily in view of the fact that counsel have both taken occasion during their respective arguments to state to you what they deem the law to be, I shall ask you to disabuse your minds of any suggestions of that kind, not necessarily that they may be wrong, but simply because the law requires you to take your instructions from the Court. That being so if the Court commits an error, and leads you into mistake by giving you law that is erroneous, there is a place to correct that; whereas if you were to get an erroneous view of the law from counsel, there would be no way of correcting any such error that might creep into your minds.

This case involves two separate actions, both prosecuted against the same defendant corporation, to recover damages alleged to have resulted from

defendant's negligence. Both actions arise out of the same transaction, that is the same producing cause of injury, and as both are against the same defendant and involve a common inquiry the law permits them to be united and tried in some respects as one. But the right of recovery is in law in each action separate and distinct, and hence, as I shall more particularly advise you, will require a separate verdict at your hands in each.

In the case in which Fred Whitsett is plaintiff, the action is prosecuted by that plaintiff, in his own right, to recover for his own benefit compensation for [109] the loss and damage alleged to have resulted to him through the defendant's negligence in causing the accident *the accident* counted upon, and the resultant wounds and injuries to his person as set forth in the complaint in that action.

In the other action in which J. E. Reardon, as administrator of the estate of Frank Whitsett, deceased, is plaintiff, the action is prosecuted by the plaintiff to recover for the benefit of James Whitsett, the father and next of kin of the decedent, damages alleged to have been suffered by the father and mother through the death of the son, resulting, as is alleged, from defendant's negligence in causing the accident in which Frank Whitsett was killed. Such a right of action the law gives under circumstances such as those here alleged.

As the evidence discloses, and about which there is no dispute, the cause of the injury in both cases, as above indicated, was the same, that is, an accidental explosion in the defendant's mine. That ac-

cident is in both instances alleged to have occurred through the defendant's negligence, and therefore the essential element of the cause of action in each case is the negligence of the defendant.

Negligence, as a ground of recovery in a civil action, is always relative to some duty owing by the party guilty of the negligent act to the person injured thereby. In this case it appears without controversy that at the time of the accident in question Fred Whitsett and Frank Whitsett, who were brothers, were both in the employment of the defendant, working in its mine where the accident in question occurred. This employment gave rise to the relationship known in the law as that of master and servant as then existing between [110] the Whitsetts and the defendant. This fact, and the fact that the injuries sued for in both actions arose out of the same accident or occurrence, renders the principles governing the relations of master and servant, which I am about to state to you, applicable to the rights of the parties to both of the actions involved, and you will so treat them.

It is implied from the contract of employment between the master and his servant, in the absence of understanding or agreement to the contrary, that the master shall supply the physical means and agencies for the conduct of his business, and shall also furnish to the employee a reasonably safe place to work. It is also implied, and public policy requires that in selecting such means and agencies and place for his employee to work, the master shall not be wanting in proper care. His negligence in that

regard is not a hazard usually or necessarily attendant upon the business, nor is it one that the servant in legal contemplation is presumed to risk.

It is the duty of the master to use reasonable and ordinary care in furnishing a safe place for his employee in which to work, and whatever risk the employee assumes in carrying on the master's business will not exempt the master from that duty.

Reasonable or ordinary care is such care as an ordinarily prudent person would exercise under like circumstances.

A servant does not assume risks resulting from the master's failure to so furnish a safe place to work, whether the performance of that duty is assumed by the master or is delegated to another.

In other words, a servant, in the absence of agreement to the contrary, has the right to look to his employer for [111] the furnishing of a safe place to work, and if the latter, instead of discharging that duty himself sees fit to delegate it to another servant, he does not thereby alter the measure of his own obligation.

This obligation imposed upon an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger to the employee may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of his employment it is made the duty of

the employee to inspect it for himself, and if the employer fails to do so and in consequence thereof his employee while engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without fault on the part of the employee, the employer is liable to the employee for such injuries.

But you will understand that this duty of an employer to furnish an employee with a reasonably safe place in which to work is not absolute. He is not required at all hazards to furnish a safe place. His duty is fulfilled when he exercises ordinary care for that purpose. If he exercises such care as men of ordinary intelligence would usually exercise under like circumstances and conditions, taking into consideration the character of the work, then he has done all that is required of him by the law and cannot be held liable for injuries received by his employee in despite of such precautions. The master, in other words, is not an insurer of the safety [112] of his employees. And of course this doctrine has no application to an instance should you find this to be one where by the terms of his employment the employee is himself required to look out for and see to the safety of his place for doing his work.

As I have said, the degree of care required of an employer in protecting his employees from injury is merely the adoption of all reasonable means and precautions to provide for the safety of his employees while they are engaged in his employment, but this degree of care is to be measured by the hazards or

dangers to be apprehended or avoided.

The failure of the employer to exercise such reasonable diligence, caution and foresight for the safety of his employee as a prudent man would exercise under the like circumstances, is negligence; and for such negligence the employer is liable to the employee for injuries suffered in consequence thereof while the employee is engaged in the performance of his duties, and without fault on his part contributing thereto.

An employer is likewise liable to his employee for loss or damage suffered by the latter in consequence of injuries received by the employee in the performance of his duties when such injuries result from the wrongful act, neglect or default of any agent or officer of such employer superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and without fault on the part of the employee directly contributing thereto.

It is alleged in the case of Fred Whitsett that the defendant employed an incompetent man as missed-hole man, [113] and that this fact contributed proximately to that plaintiff's injury. With respect to the duty of the employer to use care in selecting his employees or officers, you will understand that while he must use due care in that regard the employer does not warrant the competency and faithfulness of any one of his employees **to the others** in his employ. His liability is not of so strict a nature as that. His duty in the matter of employing and retaining and watching over his employees

is measured by the same rule of ordinary care and prudence above stated, and if he has selected them with discretion and omitted nothing that prudence dictates in overseeing them, and observing the character of their work, he has done all that the law requires of him. If he has failed in this duty, to the injury of his employee, then he is liable therefor.

The presumption is that an employee who is competent and fit when he enters the service of his employer, remains so; but this presumption may be overcome by evidence that satisfies you that such was not the fact.

It is presumed that the employer has done his duty in this regard, and has selected competent employees; hence it is incumbent upon one who seeks to recover from his employer for the carelessness of a fellow-employee, to show, not only that the fellow-employee was in fact careless, but also that the employer had knowledge of such carelessness, or by the exercise of reasonable care could have had such knowledge, or was negligent either in the selection or retention of such employee. There must be some neglect or fault in the employer proximately contributing to the injury before he can be made liable in this respect, and the burden of showing [114] such fault is on the one alleging it.

Where an employee complains that he was injured through the incompetency of a fellow-employee, it should appear that the incompetency of such fellow-employee was the proximate cause of the accident and injury. The mere fact that the fellow-employee may have been incompetent, and

that the employer had knowledge thereof, is not sufficient, unless you are satisfied from the evidence that such incompetency was the cause of the injury, or a cause directly contributing thereto and without which the injury would not have happened.

An employee must himself use care for his own safety proportionate to the risks of his employment. Such dangers as are obvious to the senses, or which with reasonable care could be discovered, if a thing it is his duty to look out for, are under the law assumed by him, and he cannot recover for injuries resulting from such dangers, since it is his duty to use such care and precaution to avoid them.

To render the employer liable for injuries to an employee, the latter must have exercised ordinary and reasonable care for his own safety, that is, such care as an ordinarily prudent person would exercise under the same or similar circumstances. The degree of care to be exercised by the employee must be adjusted to the character of the work and the limitations of his duty and should be in proportion to the dangers of the employment. Although a master may be negligent, yet if the employee is himself guilty of the negligent act which causes or directly contributes to his injury, he cannot recover.

Inasmuch as the defendant in this case is a corporation, it is pertinent to suggest to you that a corporation can only act by and through its agents and authorized representatives. [115] It is therefore responsible for the acts and omissions of its duly authorized agents to the same extent as a nat-

ural person would be for his own acts under like circumstances.

In other words, the negligence of the agents and representatives of a corporation, that is its officers or employees, is the negligence of the corporation itself, and the corporation is liable therefor to an employee injured in consequence thereof to the same extent as would be a natural person under like circumstances.

An employer, whether a natural person or a corporation, is required under the law to indemnify his employee for losses caused by the employer's want of ordinary care, where the employee is not himself at fault.

An employer, whether a natural person or a corporate body, is under obligation not to expose the employee in conducting the employer's business to perils or hazards against which he may be guarded by proper diligence on the part of the employer.

The burden of proving negligence on the part of the defendant rests on the plaintiff, and before he will be entitled to a verdict he must produce a preponderance of evidence,—that is to say, evidence which is in some degree stronger than that opposed to it, and sufficient to satisfy you to a moral certainty, or that degree of proof which produces conviction in an unprejudiced mind,—that the defendant was guilty of negligence as charged, proximately causing the injury complained of. You cannot assume that the defendant was careless or negligent from the mere fact of the accident alone, or from the fact that plaintiff was [116] injured.

The law presumes that defendant was not negligent but this presumption may be overcome by evidence satisfying you, to the extent I have indicated, to the contrary. It is for the plaintiff, as I say, to prove the negligence alleged, and when a plaintiff has introduced evidence sufficient to prove that charge, there is still no obligation on the part of the defendant to overcome it by a preponderance of evidence on his part. The burden of proof being on the plaintiff, all that is required of a defendant is that it produce evidence to offset, in the mind of the jury, the effect of the plaintiff's evidence, and if the jury find, upon the whole case as made, that the plaintiff has not shown by a clear preponderance of the evidence that the defendant was guilty of negligence causing the injuries complained of, that is, if, in your judgment, the evidence is equally balanced, you should find for the defendant. Or if you are satisfied that the accident was of a character which was unavoidable, then the verdict should be in favor of defendant.

Should you find, as claimed by defendant, that instead of its being the duty of the missed-hole man, as claimed by plaintiffs, it was the duty of the miners employed by the defendant in its mine, working in the capacity in which the Whitsetts were employed, to examine the places in which they were put to work and look for missed shots or holes, and that the Whitsetts had been informed of that duty, and you determine that the explosion of a missed shot caused the injuries complained of, and that such missed shot could have been discovered by them by

the exercise of due care, in such case, the Whitsetts being fellow-servants, neither plaintiff can recover for the negligence of the other, and your verdict [117] should be for the defendant.

It is contended in this case that the Whitsetts were chargeable with negligence on their part which directly contributed towards their injury. This constitutes a defense, if it is shown. The rule is, as I have before indicated, that when the plaintiff is in part responsible for his injury, through his own want of care proximately contributing thereto, though the defendant was also in part chargeable with negligence, no remedy is given in law. But in this defense the burden rests upon the defendant to establish it, and it must do so by the same degree of proof by which the plaintiff is required to prove his case, that is by a preponderance of the evidence.

If you find that the Whitsetts were directly in fault in the matter of causing the accident and injury complained of, of course no damages can be recovered by either one, since they would be guilty of contributory negligence which would preclude recovery.

In this connection, however, you will bear in mind that if you find that the defendant in operating the mine in question provided an inspector called a "missed-hole man," and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any

driller or chuck-tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, [118] and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself.

By applying the principles I have stated to you to the facts as you may find them from the evidence, you will be able to determine which way your verdict should go.

As you have observed from the argument, the theory of the plaintiffs is that it was the duty of the defendant, through its agent employed for the purpose—the missed-hole men—to examine and inspect its mine at the point where the Whitsetts were put to work on the occasion in question, for the detection of any missed holes or missed shots, or other source of danger, that might there exist, and to take proper care to render it safe and harmless, and that the Whitsetts were not charged with any such duty; that they had a right to rely upon this duty being performed by the missed-hole man, and were entitled to assume that it had been performed before they were set to work; that the defendant through its negligence and that of its officers failed to perform this duty, and as a result of such negligence the accident and injury resulted, without any fault or want of care on the part of the Whitsetts directly contributing thereto. Should you find this theory to be sustained by the evidence, to the degree I

have stated, then the plaintiffs will undoubtedly be entitled to recover, and your verdict should be in their favor.

The defense of the defendant, on the other hand, is, as before indicated, that under the terms of their employment, and the known manner of working the mine, it was the duty of the Whitsetts to look for and detect any such missed holes or unexploded blasts that might exist at the place of their employment and that this duty did not rest upon the defendant; [119] that it was wholly through the negligence of the Whitsetts in failing to take proper precaution and make an examination of the face of the cross-cut, that the explosion and injury occurred, and that defendant was in no respect responsible therefor. It is further claimed by the defendant that even if it can be held under the evidence that it was its duty to look after missed holes or unexploded blasts, the evidence shows that it took all due and ordinary care in this instance to discover or detect any such; and that if it was a missed shot which caused the injuries complained of, it appears that it was so concealed as to baffle and defeat any ordinary means or precaution for discovering it; and that consequently the defendant did all that its duty demanded and cannot be held responsible for the injuries complained of.

Should you find that these defenses, or either of them, is sustained by the evidence, then it is sufficient to excuse the defendant and your verdict should be in its favor. These questions rest with you.

As previously suggested to you, the right of re-

covery in these two actions being separate and distinct it will be necessary for you to find a separate verdict in each one of those actions.

As to the action brought by Fred Whitsett, which is to recover damages on his own behalf, the law is that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages. For the breach of an obligation not arising from contract (and this is a case of that character), the measure of damages is the amount which will compensate for the detriment or loss proximately caused thereby, [120] whether it could have been anticipated or not. If therefore in the case of Fred Whitsett you find under the principles that I have stated to you, that the plaintiff is entitled to recover, you may award him such compensatory damages within the amount claimed in his complaint (\$50,750) as will in your good judgment compensate him for the pecuniary damage proximately caused by the injury suffered by him, if any, as the result of the accident complained of; and in this connection you may consider his earning capacity at the time of the accident, his physical capacity at that time, and the physical and mental suffering, if any, which has been caused to him as a result of his injuries, the extent and severity of those injuries, the degree and character of pain suffered by him, if any, and its duration and severity. You may also consider whether the injuries are temporary or permanent; and from all these elements resolve what sum will fairly and rea-

sonably compensate the plaintiff for the loss suffered through such injuries. If you find that his injuries are more or less permanent, you may also take into consideration the loss, if any, which he will be reasonably certain to suffer in the future as a result of such injuries, and in determining this question you may consider, in connection with other evidence in the case, his probable expectation of life.

In the action brought by the administrator of Frank Whitsett, deceased, should you reach the conclusion that the plaintiff is entitled to a verdict you will award such amount as in your judgment will be a reasonable compensation to the father and mother of the deceased, for whose benefit the action is prosecuted, for the actual pecuniary loss suffered by them from the death of their son. That is, your verdict [121] should be limited to that amount which the evidence shows that the deceased would have probably earned, and, after paying his own expenses for his food, lodging, clothing, and the necessary and ordinary expenses and costs of living, would have given or turned over to his father and mother for their own use. The law measures the injury or loss suffered by the father or mother in a case of this kind in dollars and cents. It does not take into account their grief and sorrow over the loss of their son, as that is an element which the law does not undertake *the* measure in pecuniary damages. In other words, the damages must be simply remunerative, and that remuneration must be restricted to such sum as will amount to the reasonable expectation that the father and the mother had of pecuniary

or money benefit arising from the continuance in life of the deceased. That is the question to be determined in such a case, and you should not, in reaching your conclusion, speculate as to the amount or indulge in presumptions or conjectures not warranted by the evidence, but you should determine the amount solely by the evidence introduced before you entirely free from any sentiment or sympathy on the one hand, or bias or prejudice on the other. In reaching your conclusion in this case, as in the other, you may regard, with the other evidence in the case, the expectancy of life of the deceased and of those to be benefited by the recovery. In most cases it is the expectancy of life of the deceased alone which is the element to be considered by the jury, but in a case like this, where the respective ages of the parties entitled to recover and of the deceased indicate that the expectancy of life in the beneficiary is less than that of the deceased, it is the expectancy of life of the beneficiary of the recovery [122] that must be considered in fixing the damages.

Standard life or mortality tables are admissible in such an action to aid you in your inquiry. Such tables are not conclusive upon the question of the duration of life, but are merely competent to be weighed, with the other evidence in the case, tending to show the state of health, habits of life, and other conditions, as well as the vocation in life of the beneficiary. In any given case the expectancy of life of the person under consideration (in this case the beneficiaries) may be greater or less than that of the average person, and the amount of damages to be allowed should be increased or diminished accord-

ingly. In applying these instructions to the case which we are now considering, you will of course be governed by its facts and circumstances as proved. You are dealing simply with the question of compensation for the loss suffered. The law does not contemplate that the estate of the beneficiaries should be increased beyond what they have actually suffered.

Now, gentlemen of the jury, those are all of the specific features of the law that I care to state to you. There are some general considerations which perhaps should be suggested to you, and that is that the jury alone pass on the facts of the case. That duty rests on your shoulders, and it cannot be shared by the Court. It is neither the purpose nor the intent of the Court, nor its privilege to in anywise influence, or undertake to influence the jury in their deliberation on the facts. As I say, that is something that rests on your conscience alone. And if you have gained any idea throughout the trial of the case, or any impression, as to the attitude of mind of the Court, you should dismiss it entirely from your minds, not only because no such purpose [123] would be in the mind of the Court, but because it should not even, if it were so, affect your deliberations in the case. You are to determine this case for yourselves from the facts as they are delivered from the witness-stand.

In passing on the facts you become also the judges of the credibility of the witnesses. You determine that of course, not arbitrarily; it must be in subordination to the principles of law, and the rules of evidence, but it rests with you to say what degree of

credibility you will accord to any witness who comes on the stand. You determine that by observing the character of the witness, his manner on the stand; the character of his testimony, how far it is such as to be probable, and in accord with your own reason, or how far it appears to be improbable either inherently, or when viewed in connection with all the evidence in the case, and you will say to what extent you believe any witness that is sworn on the witness-stand.

A witness is presumed to tell the truth, and he is to be accorded that presumption unless the manner of his testimony or what he testifies to, or the other evidence in the case affecting his testimony satisfies you he is not telling the truth; but if you make up your mind that a witness is not telling the truth because he is mistaken, then while it should make you more careful to weigh the balance of his testimony, you are not called on to discredit his testimony simply because he has made a mistake; and if you determine in your minds that a witness has come on the stand, and has recklessly and intentionally sworn to a falsehood, something he knew not to be true when he was stating it, you should very carefully weigh his evidence in other respects, and entirely discredit it, [124] unless you are satisfied from the other evidence in the case he has in some respects been telling the truth. When there arises in a case, such as there has in this, a conflict in the evidence on any given point, it rests with the jury to resolve that conflict as best you may, and you do it by applying the principles I have just been stating to you, and

determining which of the witnesses engaged in that conflict of testimony have been telling the truth. There are one or two points in this case where the evidence is decidedly conflicting, and I can afford you no greater aid than I have already indicated to you for solving those differences. It simply rests with you. Happily in my mind in cases of this kind it does rest with the jury, because your minds are not circumscribed by the same considerations which flow from the mind of the trained lawyer, or judge, growing out of his knowledge of strict principles of law, and rules of evidence. Your minds are freer than that. You look at it from a plain common-sense point of view of the man who is unhampered by technical considerations, or rules, such as sometimes beset the mind of the judge. I think you will have no difficulty in this case in resolving what the facts are, and determining what your verdict shall be in these two cases.

Of course, gentlemen, as has been suggested to you there is no place in the administration of the law, either in this or any other case, for the play of sentiment. We do not deal with that in courts. We must determine cases upon the evidence in the light of the cold law, and you will bear that in mind. Whatever the rights of these parties are, are to be determined upon those lines. If these two boys,—the one a plaintiff, and the other represented by his administrator—suffered the injuries of which they complain under circumstances [125] which you find within the principles I have stated to you to render the defendant liable, they are entitled to com-

pensation. If they did not they are not entitled to compensation. It is simply a question of law and fact; the law I have given you, or endeavored to give you to the best of my ability, and the fact rests with you.

The clerk has prepared forms of verdict which you will find to accord with instructions I have given to you as to the necessities, and when you have reached a conclusion you will come into Court and report.

You all understand, gentlemen, that in the Federal Courts the verdict of the jury must be unanimous, and cannot be rendered by less than the entire jury. Are there any exceptions?

**[Exceptions to Certain Instructions Given and
Refused.]**

Mr. WILSON.—The defendant excepts to that portion of the charge relative to the assumption of risk by the employee. Also that part relative to the delegation of duty by the employer to furnish a safe place for the employee to work. Also to that part of the charge relative to the duty to provide for an inspection of the place of work, that is to say, the duty of the employer. And also that part of the charge where the jury are instructed that if they find the employer has furnished a missed-hole man, the miner then does not assume the risk of the dangers connected with the work. The defendant also excepts to the refusal of the Court to [126] charge the jury according to the first instruction submitted with reference to both cases.

Mr. WILSON.—We will except to the refusal of the Court to give Instructions No. 1; No. 4; No. 5;

No. 6; No. 8; No. 9; No. 12; No. 17; No. 25; No. 26; No. 31; and No. 32, all and each of them being submitted to your Honor in both of the cases now on trial, and to the refusal of the Court to give Instructions No. 2 and No. 4 of those separate instructions relative to the Reardon, No. 15,144.

The COURT.—Very well.

(RECITALS RELATIVE TO VERDICTS, JUDGMENTS, AND ORDERS DENYING PETITIONS FOR NEW TRIALS.)

Whereupon the jury retired at 5:20 and returned into Court at 6 o'clock with a verdict for the plaintiff in the amount of \$5,000 in case No. 15,143; and \$3,500 in case No. 15,144.

That thereafter a judgment was entered in favor of plaintiff in each case upon such verdict, and it is further certified that within the time allowed by law and the orders of this Court, defendant duly filed its petition for a new trial herein, which petition came on duly and regularly for hearing and which was denied by the Court. [127]

INSTRUCTIONS TO THE JURY REQUESTED BY THE DEFENDANT AND REFUSED.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 1 of the instructions requested by the defendant as above set forth):

“You are instructed by the Court that on the evidence and under the law you will return a verdict in this case for the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 40.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the instructions requested by the defendant as above set forth):

“The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions, if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 41. [128]

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 5 of the instructions requested by the defendant as above set forth):

“If you find from the evidence in this case

that the accident complained of was such as could, by no reasonable possibility have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 42.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 6 of the instructions requested by the defendant as above set forth):

“In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time of the accident, the defendant was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which, it may appear after the accident, would have avoided it. The requirement [129] is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily prudent persons in the same situation prior to the accident.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 43.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 8 of the instructions requested by the defendant as above set forth):

“I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses.”

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 44.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 9 of the instructions requested by the defendant as above set forth): [130]

“It is a rule applicable to cases of this charac-

ter that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employer knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the look-out for such dangers.”

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 45.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 12 of the instructions requested by the defendant as above set forth):

“The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged in extremely dangerous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations and I charge you that the occupation of a miner

is extremely dangerous, and that an employee engaged in mining is required to use every great precaution to avoid an injury. A miner should be vigilant and careful in his own behalf and should use [131] a degree of care proportioned to the degree of danger in the ordinary discharge of his duties. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation and which a reasonably prudent person would use under like circumstances.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 46.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 25 of the instructions requested by the defendant as above set forth) :

“Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a ‘two-wedged sword’ and destroy the plaintiff’s right of recovery, because, if the employee knew, or should have known, of his co-employee’s incompetency, and neglected to call his employer’s attention thereto, he is treated as being guilty of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer’s part may have

the same result as to the injured employee.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 47.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 26 of the instructions requested by the defendant as above set forth):

“If you find from the evidence in this case that the [132] defendant employed a man by the name of Yokum for the purpose of detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the

accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the [133] defendant.

“In the case brought by Reardon, for the death of Frank Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective or of the deceased in that case, then your verdict must be for the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 48.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 31 of the instructions requested by the defendant as above set forth):

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant.”

Which request was refused, and to which ruling the [134] defendant then and there excepted and now assigns the same as

ERROR NO. 49.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 32 of the additional instructions requested

by the defendant as above set forth) :

“If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 50.

Dated this 22d day of December, 1913.

C. H. WILSON,
Attorney for Defendant. [135]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,

Defendant.

**Admission of Service [of Copy of Bill of
Exceptions].**

Due service and receipt of a copy of the within bill
of exceptions, at San Francisco, California, is hereby
admitted this 26th day of December, 1913.

C. S. JACKSON and

W. M. CANNON,

Attorneys for Plaintiff. [136]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,

Defendant.

Stipulation [That Bill of Exceptions is Correct, etc.].

IT IS HEREBY STIPULATED AND AGREED by and between the attorneys for the respective parties to the above-entitled cause that the foregoing bill of exceptions is correct, and that the same may be certified and authenticated by the Honorable William C. Van Fleet, the Judge before whom said cause was tried, as a full, true and correct bill of exceptions.

Dated this 21st day of March, 1914.

C. S. JACKSON and
WM. M. CANNON,
Attorneys for Plaintiff.

C. H. WILSON,
Attorney for Defendant. [137]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,

Defendant.

Order Settling, etc., Bill of Exceptions.

That said bill of exceptions was duly prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as

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and for the bill of exceptions in the above-entitled case, and the same is hereby ordered to be a part of the record in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 23d day of March, 1914.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Mar. 24, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [138]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Private Corporation,

Defendant.

Petition for Writ of Error.

Now comes Balaklala Consolidated Copper Company, a private corporation, defendant herein, and feeling itself aggrieved by the verdict of the jury and the judgment entered thereupon on the 23d day of May, 1912, whereby it was adjudged that plaintiff have and recover from defendant the sum of Five Thousand Dollars (\$5,000.00) and costs and disbursements in this action, says that in said judgment and in the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this

defendant, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition;

WHEREFORE, this *defent* prays that a Writ of Error may issue in its behalf to the United States Circuit Court of Appeal in and for the Ninth Circuit, and according to the laws of the United States in that behalf made and provided, and that said defendant be permitted to prosecute the same to said mentioned court, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers [139] in this cause, duly authenticated, may be sent to said last mentioned Court, and that an order be made fixing the amount of a *supersedeas* bond, which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of said bond all further proceedings in this Court be suspended, stayed and superseded until the determination of said Writ of Error by the said United States Circuit Court of Appeals, in and for the Ninth Circuit. And your petitioner will ever pray.

Dated this 22d day of November, 1912.

C. H. WILSON,

CHICKERING & GREGORY,

Attorneys for Defendant.

Due service and receipt of a copy of the within petition for writ of error is hereby admitted this — day of November, 1912.

C. J. JACKSON and

W. M. CANNON,

Attorneys for Plaintiff.

[Endorsed]: Filed Novr. 22d, 1912. W. B. Mal-
ing, Clerk. [140]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Private Corporation,

Defendant.

Assignment of Errors.

Now comes the defendant herein, Balaklala Con-
solidated Copper Company, a corporation, and in
connection with its petition for a Writ of Error in
the above-entitled cause, suggests that there was error
on the part of the above-entitled court in regard to
the matters and things hereinafter set forth, and
specifies the following as errors upon which it will
urge its Writ of Error in the above-entitled action,
to wit: [141]

ASSIGNMENTS OF ERROR.

I.

That the District Court of the United States in
and for the Northern District of California erred in
permitting counsel for the plaintiff to state, in the
presence of the jury, "In this case, there is certain
indemnity insurance against this kind of action and

the Insurance Company is defending, through its own counsel, this action. Therefore, I have a right to inquire." And that counsel for plaintiff was guilty of misconduct in making said statement in the presence of the jury. That defendant objected to said statement and to the conduct of counsel in making said statement, which objection was overruled by the Court and the defendant then and there excepted thereto, which exception was duly allowed by the Court.

II.

That on May 15th, 1912, and while the jury was being impanelled in the above-entitled action during the examination of N. S. Arnold, a talisman on his *voir dire* by counsel for plaintiff, the following proceedings were had:

"Mr. CANNON.—Q. Have you any connection, either as a stockholder or otherwise, with an indemnity company or insurance for the purpose of insuring people against personal injuries?

Mr. WILSON.—I object to that question as immaterial.

Mr. CANNON.—I do not think it is immaterial. I would like to state why I ask the question.

The COURT.—What is the reason?

Mr. CANNON.—The reason is—

Mr. WILSON.—I object to the reason being stated.

The COURT.—I am asking for it. [142]

Mr. CANNON.—In this case, there is certain

indemnity insurance against this kind of action and the insurance company is defending, through its own counsel, this action. Therefore, I have a right to inquire.

Mr. WILSON.—I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

Mr. WILSON.—We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT.—The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel unless it should appear it is a pertinent fact.”

That the Court erred in refusing to discharge the jury on motion of defendant’s counsel.

III.

The following question was then propounded to said N. S. Arnold, a talisman on his *voir dire*.

“Mr. CANNON.—Q. Have you any connection, either as a stockholder or otherwise, with any indemnity company as I have described?

Mr. WILSON.—We insist upon our objection.

The COURT.—I overrule the objection.

Mr. WILSON.—I will take an exception.”

That the Court erred in permitting said question and in allowing counsel to bring before the jury, notice and information of the fact that this action was defended by an indemnity company and that defendant was protected by indemnity insurance.

IV.

That, after the jury was sworn to try the above-entitled cause and before testimony was introduced in said cause, defendant, by its counsel, moved the Court for an order requiring that plaintiff [143] elect between the two causes of action set forth in the complaint, to wit: One cause of action stated in the only count of the complaint on the theory that defendant had failed to furnish a safe place in which to work, and the second in the same count on the theory that defendant had failed to furnish a competent co-employee, the violation of which one or either of these duties giving to the plaintiff a cause of action and each of them being separate dealings. That said motion, when made, was denied by the Court which ruling defendant now assigns as error.

V.

That the Court erred in denying the motion of defendant for an order of the trial Court that plaintiff be restricted in his proof to the particular cause of action stated in his complaint, to wit, that the injury here complained of was approximately caused by the negligence of the defendant in failing to provide a careful and competent man, known as a "*miss-hole man*" or a "*missed-shop man*." To which ruling, defendant duly and regularly excepted and now assigns as error.

VI.

That during the trial of said action, Lawrence Whitsett was called as a witness in behalf of plaintiff and was asked the following question:

"Mr. CANNON.—Q. I will ask you, Mr.

Whitsett, from your experience whether when there remains an unexploded blast or what is called a 'missed hole,' whether in driving another hole in the vicinity of the 'missed hole' or one that is about to cross it or driven into it, there is danger under those circumstances of the 'missed hole' exploding.

A. It is dangerous."

Defendant objected to this question and answer as immaterial and not the subject of expert testimony, which objection was overruled [144] and the defendant then and there duly excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

VII.

The following question was then propounded to the said witness:

"Q. What was done with Fred after he was taken from the mine?

A. He was taken to the hospital.

Q. How was he taken to the hospital?

A. In a wagon."

That defendant objected to the last question and answer as immaterial, which objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question, and in overruling said objection.

VIII.

Said witness further testified that Fred Whitsett was taken to the hospital on the day of the accident.

"Q. He was fixed up—furnished with a cot?

A. They had a cot for him. Fred was put in a wagon on a cot."

Defendant objected to this question and answer on the ground that it was incompetent, irrelevant and immaterial, and no part of the *res gestae*. The objection was overruled and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial court.

IX.

The following question was then propounded to said witness of and respecting Fred Whitsett, the plaintiff.

"Mr. CANNON.—Q. State what the manner and appearance of your brother at the present time is, physically and mentally as compared with his condition at and before the time of this accident.

A. He does not seem to have the mind he had before the accident. [145]

Mr. WILSON.—Let me move to strike out the answer as not responsive and incompetent, no proper data laid for it.

The COURT.—It is not necessary, Mr. Wilson. You have your exception to the ruling."

That defendant objected to this question and answer as incompetent, irrelevant and immaterial, calling for the opinion of the witness, and no proper foundation made. The objection was overruled. The defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in denying defendant's motion to strike out said answer.

X.

The following question was then propounded to said witness:

“Q. Had you, prior to this accident, discovered any ‘missed holes’ in the places where you were working? A. Yes, sir.

Q. Had you done anything with reference to these ‘missed holes’?

A. I reported them to the company.”

That defendant objected to the last question and answer as immaterial, incompetent and irrelevant, and no part of the *res gestae*. Which objection was overruled. Defendant thereupon then and there excepted thereto. That the Court erred in allowing said witness to answer said question.

XI.

The following question was then propounded to said witness:

“Q. To what particular person in connection with the company did you report these ‘missed holes’? A. To B. Hall.”

Defendant objected to this question and answer as immaterial, irrelevant and incompetent, and no part of the *res gestae*, which objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to [146] answer said question.

XII.

The following question was then propounded to said witness:

“Q. When he came back to work, what was his appearance?

A. Well, he would be intoxicated."

Defendant objected to this question and answer as immaterial. The objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question.

XIII.

The following question was then propounded to said witness:

"Q. Was he, your father, at this time at the time of the accident to your brother or for several years prior thereto, able to work?

A. No, sir."

Defendant objected to this question and answer as incompetent, irrelevant and immaterial.

The objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XIV.

The following question was then propounded to said witness:

"Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally? A. They were very poor."

Defendant objected to this question and answer as irrelevant, incompetent and immaterial, not the proper proof of damages in the case, calling for the conclusion of the witness, and on the grounds shown in the California case of *Johnson vs. Beadle*.

Objection was overruled and the defendant then

and there excepted thereto. [147]

That the Court erred in allowing said witness to answer said question.

XV.

The following question was then propounded to said witness by the Court:

“Q. Would he go to cross-cuts where the holes had been exploded, or where they had not?

A. Where they had been exploded.”

That defendant objected to this question and answer as leading, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in asking and allowing said witness to answer said question.

XV $\frac{1}{2}$.

The following question was then propounded to said witness by the Court:

“Q. State, if you can, where he would go.

A. He would go to different cross-cuts and places through the mine.”

Defendant thereupon moved that the answer to said question be stricken out as hearsay, and as a conclusion and opinion of the witness, which motion was denied by the Court.

That the Court erred in denying defendant's said motion to strike out.

XVI.

The following question was then propounded to said witness:

“Q. State what the practice was, Mr. Whitsett, with reference to what the men did in going

back to work day by day or where they would go to work.

A. They would probably go to some other place. There is many places they are liable to take. Any place in the drift." [148]

Defendant objected to this question and answer as immaterial, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XVII.

Enos Wall, being called as a witness on behalf of the plaintiff, and the following question was then propounded to said witness:

"Q. To get him from the point where you found him to where the skip was, how did you have to go; where did you have to go?

A. We went from No. 4 out through No. 3 and to skip at No. 3 and down the main tunnel."

Defendant objected to this question and answer as incompetent, no part of the *res gestae* and matter occurring after the accident, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XVIII.

The following question was then propounded to said witness:

"What kind of a wagon did you take him to the hospital in? A. It was a dead X wagon."

Defendant objected to this question and answer as

immaterial, no part of the *res gestae*, no element of damage in the case, and incompetent. Which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XX.

Ed Whitsett, called as a witness on behalf of the [149] plaintiffs, the following question was then propounded to said witness:

“Q. What appears to be his mental condition now with respect to memory and his mentality generally, as compared with what he was before the accident?”

A. Nothing at all. The mind isn't like it was before at all.”

Defendant objected to this question and answer as incompetent under the pleadings, irrelevant, that there is nothing of that character alleged in the pleadings, and that this was a point attempted by defendant to be cured in the complaint at the time of the demurrer, which demurrer in this particular was overruled; which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXI.

That the following question was then propounded to said witness:

“Q. And what else is the trouble with your mother?”

A. Other ailments, I could not say what; that

has been the principal thing, so the doctor told me."

Which answer defendant moved to strike out as hearsay, which motion was denied by the Court and the defendant then and there excepted thereto.

That the Court erred in allowing said answer to stand and in denying said motion to strike out said answer.

XXII.

Fred Whitsett, called as a witness on behalf of the plaintiffs, the following questions were propounded to said witness:

"Q. You were under the influence of an anaesthetic? A. Yes, sir. [150]

"Q. What was the operation?

"A. Removing bones.

"Q. From your leg? A. Yes, sir.

"Mr. WILSON.—It strikes me that the witness is unable to testify to that fact, if your Honor please. I move to strike it out.

"Q. (By the COURT.) All you know you went on the table at 8 o'clock in the morning?

"A. Yes, sir."

That on defendant's motion to strike out said answer and said matter and facts, the Court denied said motion and defendant then and there excepted thereto.

That the Court erred in denying said motion to strike out.

XXIII.

That the following question was then propounded to said witness:

“Q. What was the total expense over and above what you were entitled to at the hospital?

“A. All over \$248.00.”

Defendant objected to this question and answer as unfair to the witness, incompetent, irrelevant, and immaterial, and on the ground that plaintiff is entitled to recover the amount he himself spent or was spent on his account; which objection was overruled, and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXIV.

The following questions were propounded to said witness:

“Q. On the day of the operation at the hospital at the end of the operation at 6 P. M., what were they doing to you when you woke up?

“A. They were rubbing my arms.

“Q. How many were doing it?

“A. Three of them.

“Q. Three of them working on you?

“A. Yes, sir.” [151]

“Mr. WILSON.—I move to strike that out as no part of the injury or damage, incompetent and irrelevant.”

That defendant's motion to strike out, as above shown, was denied by the Court, and defendant then and there excepted to.

That the Court erred in denying defendant's said motion to strike out the answer to said questions and said matter.

XXV.

That thereafter and after the close of the testimony of Fred Whitsett, Mr. Cannon made the following offer in words following, to wit:

“Mr. CANNON.—We offer now in evidence, if your Honor please, the American Tables of Mortality to show the expectancy of life of these plaintiffs. It will not be necessary to introduce the whole table, will it?

“Mr. WILSON.—I have an objection, if your Honor please. We object to the table on the ground that under the facts shown in this case it is incompetent, irrelevant, and immaterial; citing your Honor to 17 Cyc. 422, the case of VICKSBURG RAILWAY vs. WHITE.”

That the Court overruled defendant's objection above shown, and admitted in evidence the American Tables of Mortality, and that defendant then and there excepted thereto.

That the Court erred in allowing said Tables of Mortality admitted in evidence.

XXVI.

That thereafter and after the plaintiffs had rested and after the admission in evidence of said Tables of Mortality the defendant moved to strike out all the testimony in the case as to the incompetency of the man Yokum, and all of the testimony in the case as to his being intoxicated or seen intoxicated [152] on the ground that it is not shown in the case that Yokum was intoxicated on the day of the accident, and that it was not by reason of the intoxication of Yokum that no proper inspection of the face of the

drift was had, and that it is not shown that he had at any time on that day inspected the face in question, and that it is not shown that such evidence tended to prove the negligence or the incompetency or the impairment of the ability of Yokum, and that it is not shown that it was by reason of Yokum's drinking habits that he was careless or unfit or ever at any time overlooked a "missed hole," and on the ground that it did not appear that Yokum had had anything to do with the work of inspecting the drift or face in which the accident occurred, and that it was not shown that a "missed shot" had been exploded, which caused the accident and injuries complained of.

That the Court denied said motion to strike out the evidence relating to said Yokum and as to his intoxication and incompetency, to which ruling the defendant then and there excepted.

That the Court erred in denying said motion to strike out said testimony.

XXVII.

That thereafter defendant made its motion for a nonsuit, on the grounds that the plaintiff had failed to substantiate the allegations of negligence in this case, upon the ground that the evidence fails to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; upon the further ground that it did not appear from the evidence in the case that the defendant negligently or carelessly omitted or failed to furnish a safe place in which to perform the work; upon the further ground that there is no evi-

dence in the case that the [153] “missed-shot” man Yokum was habitually intoxicated, or that his services were rendered inefficient by reason of any intoxication upon his part, or that the defendant knew or had reason to know of his habits of intoxication; on the further ground that it is not shown in the evidence that Yokum had anything to do with the inspection of the particular face in which the accident and injury complained of occurred.

That the Court denied said motion for a nonsuit, to which ruling the defendant then and there excepted.

That the Court erred in denying defendant’s motion for a nonsuit.

XXVIII.

Ira L. Greninger, being called as a witness on behalf of the defendant, the following question was then propounded to said witness on cross-examination:

“Mr. CANNON.—Q. Supposing, Mr. Greninger, that the missed-hole man in performing his duties and going his rounds, found a place where the muck had been entirely removed, would it be his duty to examine that face for missing-holes?

A. So far as he was able, yes.”

That defendant then and there objected to this question and answer upon the ground that it did not appear whether the question is directed to a first examination the first time he saw this face after it was charged, or whether it was the second time; which objection the Court overruled, and the defend-

ant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXIX.

The following question was then propounded to said witness:

“Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the [154] mine in the underground working of that mine? A. No, sir.”

That defendant objected to said question and answer on the ground that it was immaterial and not cross-examination, and that said objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXX.

That the following question was then propounded to said witness:

“Q. To what shift boss did you ever give any instructions or directions that the ‘missed-hole’ man was only hired for protection to inexperienced men?”

“A. My giving instructions to three or four hundred men at the same time having that many under me, I cannot call to mind any one instance or any instance by itself.”

That defendant objected to this question and answer on the ground that it is not in itself an instruction, is incompetent, irrelevant and immaterial, and not cross-examination.

That said objection was overruled by the Court and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question. [155]

XXXI.

Christa B. Hall, being called as a witness on behalf of defendant, the following question was then propounded to said witness:

“Mr. CANNON.—Q. And did you not say to Mr. Greninger that you did not want to discharge him **because they** would give you an Italian, or someone who could not speak English, and you would have to go with him from place to place in the mine and show him what to do and that would make you back-track on your work? Did you not say that?

A. Not to Mr. Greninger.”

That defendant objected to this question and answer on the grounds that there was no foundation laid for it and that while Mr. Greninger was on the stand, no such testimony was elicited, which objection was overruled and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXII.

The following question was then propounded to said witness:

“Q. Then to whom?

A. I might have said it. I don't remember.”

Defendant objected to this question and answer as incompetent, irrelevant and immaterial and not cross-

examination, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIII.

The following question was then propounded to said witness:

“Q. Have you not said to them in the presence of those three boys, leaving out Fred, in the presence of Lawrence Whitsett and Enos Wall, have you not said during this trial in San Francisco here that they wanted you to discharge Yokum because of his drinking [156] habits and you did not want to discharge him because they would give you an Italian or someone who could not speak English and you would have to go with the Italian and show him the things he would have to do and he would make you back-track on your way; did you say that?

A. No, sir. Not in Frisco. I never said anything to Lawrence or Wall about it.”

That defendant objected to this question and answer as irrelevant and incompetent, no proper foundation laid, and not cross-examination, and that the time, place and persons present were not specified, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIV.

The following question was then propounded to said witness:

“Q. Did you say, what I have stated, to Lawrence or to Wall or to both of them anywhere else than in Frisco?

A. Not that I remember.”

Defendant objected to this question on the ground that it is irrelevant and incompetent, no proper foundation laid, and not cross-examination, and that the time, place and persons present were not specified, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXV.

The following question was then propounded to said witness:

“Q. Did you not tell Enos Wall in the same conversation I have already mentioned in San Francisco since this trial started that Yokum was in the habit of hiding away from you in the mine, or words to that effect?

A. I did not.” [157]

That defendant objected to this question and answer on the ground that it was incompetent, irrelevant and not cross-examination and no proper foundation laid, time, place or persons present not being specified, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVI.

The following question was then propounded to said witness:

“Q. Did you not, between eight and ten on the night of the accident, take Frank to some other part of the mine to show him where to go to work after finishing the other two holes or two holes and the part of a hole that was left to be done in that round? A. Fred.”

Defendant objected to this question and answer as not cross-examination, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVII.

The following questions were then propounded to said witness:

“Q. Is it not a fact that Yokum was discharged within a week after this accident?

Mr. WILSON.—I object to that as immaterial.

The COURT.—The objection is overruled.

Mr. CANNON.—Q. Is that not a fact?

A. Yokum was discharged afterwards.

Q. Almost immediately after the accident?

A. He went on the other shift.”

Defendant objected to these questions and answers on the ground that it was immaterial, and that the proper way to go at the matter was to ask the witness when Yokum was discharged, which [158] objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVIII.

The following question was then propounded to said witness:

“Q. You put him out from your shift on to the other shift?

A. I had orders from the other boss.”

Defendant objected to this question and answer as immaterial, irrelevant, and not cross-examination.

The objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIX.

The following question was then propounded to said witness:

“Q. And after he got into the other shift, Greninger discharged him?

A. That is what Yokum told me.”

Defendant objected to this question and answer as immaterial, irrelevant and not cross-examination.

The objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XL.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instructions (the same being numbered 1 of the instructions requested by the defendant as above set forth):

“You are instructed by the Court that on the evidence and under the law, you will return a

verdict in this case for the [159] defendant."

Which request was refused, to which ruling the defendant then and there excepted and now assigns the same as ERROR NUMBER 40.

That the Court erred in refusing to give said instruction to the jury. [160]

XLII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the instructions requested by the defendant as above set forth):

"The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions, if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 41.

That the Court erred in refusing to give said instruction to the jury.

XLIII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give

to the jury the following instruction (the same being numbered 5 of the instructions requested by the defendant as above set forth):

“If you find from the evidence in this case that the accident complained of was such as could, by no reasonable possibility have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 42. [161]

That the Court erred in refusing to give said instruction to the jury.

XLIII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 6 of the instructions requested by the defendant as above set forth):

“In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time of the accident, the defendant was negligent in failing to anticipate and provide against the occurrence? The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which,

it may appear after the accident, would have avoided it. The requirement is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily prudent persons in the same situation prior to the accident."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 43.

That the Court erred in refusing to give said instruction to the jury.

XLIV.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the [162] jury the following instruction (the same being numbered 8 of the instructions requested by the defendant as above set forth):

"I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses."

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 44.

That the Court erred in refusing to give the said instruction to the jury. [163]

XLV.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 9 of the instructions requested by the defendant as above set forth):

“It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers.”

Which request was refused, to which ruling the defendant then and there excepted and now assigned the same as ERROR NO. 45.

That the Court erred in refusing to give said instruction to the jury.

XLVI.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being

numbered 12 of the instructions requested by the defendant as above set forth) :

“The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged in extremely dangerous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations and I charge you that the occupation of a miner is extremely dangerous, and that an employee engaged in mining is required to use every great precaution to [164] avoid an injury. A minor should be vigilant and careful in his own behalf and should use a degree of care proportioned to the degree of danger in the ordinary discharge of his duties. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation and which a reasonably prudent person would use under like circumstances.”

Which request was refused, to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 46.

That the Court erred in refusing to give said instruction to the jury.

XLVII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give

to the jury the following instruction (the same being numbered 25 of the instructions requested by the defendant as above set forth):

“Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a ‘two-edged sword’ and destroy the plaintiff’s right of recovery, because, if the employee knew, or should have known, of his co-employee’s incompetency, and neglected to call his employer’s attention thereto, he is treated as being guilty of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer’s part may have the same result as to the injured employee.”

Which request was refused, to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 47.

That the Court erred in refusing to give said instruction to the jury.

XLVIII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following [165] instruction (the same being numbered 26 of the instructions requested by the defendant as above set forth):

“If you find from the evidence in this case
that the defendant employed a man by the name
of Yokum for the purpose of detecting missed
shots after blasts in the faces of the drifts and
cross-cuts in its mine, and if you further find
that said Yokum was addicted to the use of in-

toxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was

the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the defendant.

“In the case brought by Reardon, for the death of Frank [166] Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective or of the deceased in that case, then your verdict must be for the defendant.”

Which request was refused, to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 48.

That the Court erred in refusing to give said instruction to the jury.

XLIX.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 31 of the instructions requested by the defendant as above set forth):

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast

that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 49.

That the Court erred in refusing to give said instruction to the jury. [167]

L.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 32 of the additional instructions requested by the defendant as above set forth):

"If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that

neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant.”

Which request was refused and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 50.

That the Court erred in refusing to give said instruction to the jury. [168]

LI.

On the close of the testimony and before the jury retired for deliberation, the Court gave its certain instructions to the jury and when said instructions of the Court were so given to the jury, and before the jury was retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

“In this connection, however, you will bear in mind that if you find that the defendant in operating the mine in question provided an inspector called a ‘missed hole man,’ and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck-tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption,

and would not be guilty of negligence for failing to make such inspection himself."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 51.

That the Court erred in giving said instruction to the jury.

LII.

When said instructions were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

"This obligation imposed upon an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger to the employee [169] may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of his employment it is made the duty of the employee to inspect it for himself, and if the employer fails to do so and in consequence thereof his employee while engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without fault on the part of the employee, the employer is liable to the employee for such injuries."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 52.

That the Court erred in giving said instruction to the jury.

LIII.

When said instructions were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

“A servant does not assume risks resulting from the master’s failure to so furnish a safe place to work, whether the performance of that duty is assumed by the master or is delegated to another. In other words, a servant, in the absence of agreement to the contrary, had the right to look to his employer for the furnishing of a safe place to work, and if the latter, instead of discharging that duty himself sees fit to delegate it to another servant, he does not thereby alter the measure of his own obligation.”

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 53.

That the Court erred in giving said instruction to the jury.

LIV.

When said instructions were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the [170] action of the Court in instructing the jury as follows:

“It is the duty of the master to use reasonable

and ordinary care in furnishing a safe place for his employee in which to work, and whatever risk the employee assumes in carrying on the master's business will not exempt the master from that duty."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 54.

That the Court erred in giving said instruction to the jury.

LV.

That said Court erred in overruling and denying the petition of the defendant for a new trial which is as follows: [171]

(Title of Court and Cause.)

NOTICE.

To the Plaintiff in the Above-entitled Action, to William M. Cannon, Esq., and C. S. Jackson, Esq., His Attorneys:

You and each of you will please take notice that there is served herewith a copy of the petition of the defendant for a new trial in the above-entitled action, and that said defendant will move the Court to grant a new trial upon the grounds set forth in the said petition.

Dated July 5th, 1912.

C. H. WILSON,
CHICKERING & GREGORY,
Attorneys for Defendant.

(Title of Court and Cause.)

PETITION FOR A NEW TRIAL.

To the Honorable, the District Court of the United States, in and for the Northern District of California, Second Division:

The defendant in the above-entitled action hereby petitions for a new trial therein upon the following grounds:

1st: Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

2d: Misconduct of the jury.

3d: Accident or surprise which ordinary prudence could not have guarded against.

4th: Excessive damages appearing to have been given under the influence of passion or prejudice.

5th: Insufficiency of the evidence to justify the verdict.

6th: That the verdict is against law. [172]

7th: Errors in law occurring at the trial.

The defendant hereby specifies the following particulars wherein the evidence is insufficient to justify the verdict.

1st: That the evidence does not show any negligence on the part of the defendant contributing proximately as a cause to the accident and injury complained of.

2d: That the evidence clearly shows that the accident and injury complained of were proximately caused by the contributory negligence of the plaintiff.

3d: That the evidence clearly shows that the accident and injury complained of were proximately caused by the negligence of Frank Whitsett, a co-employee of the plaintiff.

4th: That the evidence clearly shows that the plaintiff assumed all risk of injury from unexploded blasts or missed shots, while working in the mine of this defendant.

5th: That the evidence clearly shows that the damages awarded to the plaintiff are excessive.

SPECIFICATION OF PARTICULARS IN WHICH THE VERDICT IS AGAINST LAW.

1st: That the verdict is against law in each and every and all of the particulars in which it is herein specified that the evidence is insufficient to justify the verdict.

2d: That the verdict is against law, inasmuch as there is no evidence of any negligence on the part of the defendant contributing as a proximate cause to the accident and injury complained of by the plaintiff.

SPECIFICATION OF ERRORS OF LAW.

1st: It was error for the trial Court to permit counsel for the plaintiff to state in the presence of the jury [173] that the defendant in this case was insured against liability for the accident and injury complained of by plaintiff, and that this action is defended by an *an* accident insurance company.

2d: That the evidence clearly shows that the accident and injury complained of were proximately caused by the contributory negligence of the plaintiff.

3d: That the evidence clearly shows that the accident and injury complained of were proximately caused by the negligence of Frank Whitsett, a co-employee of the plaintiff.

4th: That the evidence clearly shows that the plaintiff assumed all risk of injury from unexploded blasts or missed shots, while working in the mine of this defendant.

5th: That the evidence clearly shows that the damages awarded to the plaintiff are excessive.

SPECIFICATION FOR PARTICULARS IN WHICH THE VERDICT IS AGAINST LAW.

1st: That the verdict is against law in each and every and all of the particulars in which it is herein specified that the evidence is insufficient to justify the verdict.

2d: That the verdict is against law, inasmuch as there is no evidence of any negligence on the part of the defendant contributing as a proximate cause to the accident and injury complained of by the plaintiff.

SPECIFICATION OF ERRORS OF LAW.

1st: It was error for the trial Court to permit counsel for the plaintiff to state in the presence of the jury that the defendant in this case was insured against liability for the accident and injury complained of by plaintiff, and that this action is defended by an accident insurance company.

2d: It was error for the trial Court to deny defendant's motion that plaintiff elect between the two causes [174] of action set forth in the complaint.

3d: It was error for the trial Court to deny de-

defendant's motion that plaintiff be restricted in his proof in this case to the particular cause stated in plaintiff's complaint, to wit, that the injury here complained of was proximately caused by the negligence of the defendant in failing to provide a careful and competent man, known as a "missed-hole" man or a "missed-shot" man.

4th: It was error for the trial Court to overrule defendant's objection to the question: "How was he taken to the hospital?" propounded to the witness Lawrence Whitsett.

5th: It was error for the trial Court to overrule the objection of the defendant to the following question, to wit: "What was the financial condition of your parents at the time of the death of the one brother and the injury to the other?" propounded to the witness Lawrence Whitsett.

6th: It was error for the trial Court to deny defendant's motion to strike out the answer to the following question propounded to the witness Lawrence Whitsett: "State, if you can, where he would go," said answer being: "He would go to different cross-cuts and places through the mine; presumably that is his duty." And also in overruling defendant's objection to the following question propounded to the same witness: "State what the practice was, Mr. Whitsett, with reference to what the men did in going back to work day by day, and where they would go to work."

7th: It was error for the trial Court to overrule defendant's objection to the question propounded to the witness Wall, as follows: "What kind of a wagon did you take him to the hospital in?"

8th: It was error for the trial Court to overrule defendant's objection to the question propounded to the witness [175] Ed Whitsett, as follows: "Q. What appears to be his mental condition now with respect to memory and his mentality generally as compared with what he was before the accident?"

9th: It was error for the trial Court to overrule defendant's objection to the following question propounded to the witness Fred Whitsett: "Q. Did you belong to an organization which entitled you to such treatment at the hospital?"

10th: It was error for the trial Court to overrule defendant's objection and to receive in evidence on behalf of plaintiff the American Tables of Mortality.

11th: It was error for the trial Court to deny defendant's motion to strike out all of the testimony as to the incompetency of the man Yokum and all of the testimony as to his being intoxicated or being seen intoxicated.

12th: It was error for the trial Court to overrule defendant's motion for a nonsuit.

13th: It was error for the trial Court to overrule the objection of the defendant to the following questions propounded to the witness Greninger, to wit: "Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the mine in the underground working of that mine?" And, "Q. To what shift bosses did you ever give any instructions or directions that the 'missed-hole' man was only hired for protection to inexperienced men?"

14th: It was error for the trial Court to overrule

defendant's objection to the following question propounded to the witness Hall, to wit: "Q. Have you not said to them in the presence of those three boys, leaving out Fred, in the presence of Lawrence Whitsett and Enos Wall; have you not said during this trial in San Francisco here that they wanted you to discharge Yokum because of his drinking habits, and you did [176] not want to discharge him because they would give you an Italian or someone who would not speak English and you would have to go with the Italian and show him the things he had to do and he would make you back-track on your work; did you say that?"

15th: It was error for the trial Court to overrule defendant's objection to the following questions propounded to the witness Hall, to wit: "Q. State whether or not after this accident you transferred Yokum from your shift to the other shift" and, "Q. And after he got in the other shift Greninger discharged him?"

16th: It was error for the trial Court to charge the jury as follows, to wit:

"This obligation imposed upon an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger to the employee may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of

his employment it is made the duty of the employee to inspect it for himself; and if the employer fails to do so and in consequence thereof his employee while engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without fault on the part of the employee, the employer is liable to the employee for such injuries."

17th: It was error for the trial Court to refuse to charge the jury according to the defendant's first request, as follows:

"You are instructed by the Court that on the evidence [177] and under the law you will return a verdict in this case for the defendant."

18th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

"The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions, if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant."

19th: It was error for the trial Court to refuse

to charge the jury according to defendant's request as follows, to wit:

"If you find from the evidence in this case that the accident complained of was such as could, by no reasonable possibility have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant."

20th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

"In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time of the accident, the defendant was negligent in failing to anticipate and [178] provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which, it may appear after the accident, would have avoided it. The requirement is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily prudent persons in the same situation prior to the accident."

21st: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

“I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses.

POORMAN SILVER MINES *vs.* DELVING,
18 Am. Neg. Rep. 311.”

22d: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

“It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employer knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, [179] and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the look-out for such dangers.

THOMPSON vs. CAL. CONSTRUCTION
CO. 148 Cal. 39."

23d: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

"The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged *un* extremely dangerous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations, and I charge you that the occupation of a miner is extremely dangerous, and that an employee engaged in mining is required to use very great precaution to avoid an injury. A miner should be vigilant and careful in his own behalf and should use a degree of care proportionate to the degree of danger in the ordinary discharge of his duties. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation and which a reasonably prudent person would use under like circumstances.

WHITE, PERSONAL INJURIES IN
MINES, Sec. 256."

24th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

“Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a ‘two-edged sword’ and destroy the plaintiff’s right of recovery, because, if the employee knew, or should have known, of his coemployee’s incompetency, and neglected to call his employer’s attention thereto, he is treated as being guilty [180] of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer’s part may have the same result as to the injured employee.

WOOD’S LAW OF MASTER AND SERVANT, Sec. 433.”

25th: It was error for the trial Court to refuse to charge the jury according to the defendant’s request as follows, to wit:

“If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become permanently

impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved [181] from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the defendant.

In the case brought by Reardon, for the death of Frank Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a

missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective or of the deceased in that case, then your verdict must be for the defendant."

26th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

"If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant." [182]

27th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

"If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor,

and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant.”

Said petition will be heard upon the pleadings and papers on file and upon the minutes of the Court and any notes and memoranda which may have been kept by the Judge, and also the reporter's transcript of his shorthand notes.

Dated this 5th day of July, 1912.

C. H. WILSON,

CHICKERING & GREGORY,

Attorneys for Defendant. [183]

Which action of said Court in overruling and denying defendant's petition for a new trial the defendant now assigns as ERROR NO. 55.

WHEREFORE, the said defendant, Balaklala Consolidated Copper Company, a corporation, prays that the judgment of the District Court of the United States, in and for the Northern District of California, Second Division, entered herein in favor of the plaintiff and against the defendant be reversed and that the said District Court of the United States, in and for the Northern District of Califor-

nia, Second Division, be directed to grant a new trial of said cause.

Dated this 22d day of November, 1912.

C. H. WILSON,
CHICKERING & GREGORY,
Attorneys for Defendant.

Due service of the within assignment of errors and receipt of a copy thereof is hereby admitted this 22d day of November, 1912.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 22d, 1912. W. B. Maling,
Clerk. [184]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Private Corporation,
Defendant.

**Order Allowing Writ of Error and Fixing Amount
of Supersedeas Bond.**

Upon motion of C. H. Wilson, attorney for defendant herein, made this 22d day of November, 1912, and upon the filing of said defendant's peti-

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tion for the allowance of a writ of error inteded to be urged by defendant, and upon the filing of the assignments of error by defendant;

IT IS ORDERED, and the Court hereby

ORDERS, that a Writ of Error, as prayed for in said petition, be allowed and that the amount of the supersedeas bond to be given by defendant and upon said writ of error be, and the same is hereby fixed at the sum of SEVEN THOUSAND FIVE HUNDRED Dollars (\$7,500.00), and that upon the giving of said bond all further proceedings in this Court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeal, in and for the Ninth Circuit.

Dated this 22d day of November, 1912.

WM. C. VAN FLEET,

Judge. [185]

[Endorsed]: Filed Nov. 22, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [186]

*In the District Court of the United States in and for
the Northern District of California, Second
Division.*

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Private Corporation,

Defendant.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:

That we, Balaklala Consolidated Copper Company, a private corporation, defendant above named, as principal, and The Title Guaranty & Surety Company a Corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, as surety, are held and firmly bound unto Fred Whitsett, plaintiff above named, in the sum of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7,500.00), to be paid to said Fred Whitsett, his executors or administrators, to which payment well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals and dated the 22d day of November, 1912.

WHEREAS, the above-named defendant, Balaklala Consolidated Copper Company, a private corporation, has sued out a writ of error to the United States Circuit Court of Appeal, in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled cause by the District Court of the United [187] States, in and for the Northern District of California, Second Division, in favor of the above-named plaintiff and against the defendant therein for the sum of Five Thousand Dollars (\$5,000.00), interest and costs,

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the above-

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named Balaklala Consolidated Copper Company, a private corporation, shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, the said Balaklala Consolidated Copper Company, a private corporation, and The Title Guaranty & Surety Company, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, have caused these presents to be executed this 22d day of November, 1912.

**BALAKLALA CONSOLIDATED COPPER
COMPANY,**

By **CHICKERING & GREGORY,**

Its Attorney.

**THE TITLE GUARANTY & SURETY
COMPANY,**

[Seal]

By **C. F. MANNESS,**

Its Attorney in Fact.

Approved:

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 22, 1912. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. **[188]**

[Certificate of Clerk U. S. District Court to Transcript of Record, etc.]

In the District Court of the United States in and for the Northern District of California, Second Division.

No. 15,143.

FRED WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Private Corporation,

Defendant.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify the foregoing one hundred and eighty-eight (188) pages, numbered from 1 to 188, inclusive, to be a full, true and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and on file in the office of the Clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is \$105.00, that said amount was paid by C. H. Wilson, attorney for the above-named defendant; and that the original writ of error and citation issued in said cause are hereto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District

Court, this 9th day of May, A. D. 1914.

[Seal]

WALTER B. MALING,

Clerk of the District Court of the United States, for
the Northern District of California. [189]

[Writ of Error (Original).]

UNITED STATES OF AMERICA,—ss.

The President of the United States, to the Honorable, the Judges of the District Court

[Seal]

of the United States, in and for the
Northern District of California,

GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between Balaklala Consolidated Copper Company, a private corporation, plaintiff in error, and Fred Whitsett, defendant in error, a manifest error hath happened to the great damage of the said Balaklala Consolidated Copper Company, a private corporation, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 21st

day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern [190] District of California, the 23d day of November, in the year of our Lord One Thousand Nine Hundred and Twelve.

[Seal]

W. B. MALING,

Clerk of the District Court of the United States, in
and for the Northern District of California.

Allowed by

WM. C. VAN FLEET,

Judge. [191]

Receipt of a copy of the within is hereby admitted
this 23d day of November, 1912.

W. M. CANNON and

C. S. JACKSON,

Attorneys for Defendant in Error.

[Answer to Writ of Error.]

The Answer of the Judges of the District Court of the United States for the Northern District of California.

The record and all proceedings of the plaint, whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the

day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: No. 15,143. District Court of the United States, Northern District of California, Second Division. Balaklala Consolidated Copper Company, a Corporation, Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Writ of Error. Filed Nov. 23, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [192]

Citation on Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to Fred Whitsett, Esq., Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, in and for the Northern District of California, Second Division, wherein Balaklala Consolidated Copper Company, a corporation, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in this behalf.

WITNESS the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, this 22d day of November, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge. [193]

Receipt of a copy of the within Citation is hereby admitted this 22d day of November, 1912.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Plaintiff.

[Endorsed]: No. 15,143. District Court of United States, Northern District of California, Second Division. Balaklala Consolidated Copper Company, a Corporation, Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Citation on Writ of Error. Filed Nov. 23, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [194]

[Endorsed]: No. 2419. United States Circuit Court of Appeals for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed May 9, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

*In the United States Circuit Court of Appeals, Ninth
Circuit.*

No. —.

**BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation,**

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time to [January 20, 1913, to]
File Record Thereof and Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including January 20, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 20, 1912.

WM. C. VAN FLEET,
United States District Judge for the Northern Dis-
trict of California.

[Endorsed]: No. 2419. United States Circuit Court of Appeals for the Ninth Circuit. Filed Dec. 19, 1912. F. D. Monckton, Clerk.

In the United States District Court, for the Northern District of California, Second Division.

No. 15,143.

**BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation,**

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time to [February 19, 1913, to]
File Record Thereof and Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including February 19, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 18, 1913.

WM. W. MORROW,
Judge.

[Endorsed]: No. 2419. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Feb. 19, 1913, to File Record Thereof and to Docket Case. Filed Jan. 18, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation,
Plaintiff in Error,
vs.

FRED WHITSETT,
Defendant in Error.

**Order Extending Time to [March 20, 1913, to] File
Record Thereof and Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error may have to and including March 20, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 2419. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 20, 1913, to File Record Thereof and to Docket Case. Filed Feb. 19, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals for
the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation,
Plaintiff in Error,
vs.

FRED WHITSETT,
Defendant in Error.

**Order Extending Time to [April 18, 1913, to] File
Record Thereof and Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error have to and including the 18th day of April, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 19, 1913.

WM. C. VAN FLEET,
Judge.

[Endorsed]: No. 2419. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to April 18, 1913, to File Record Thereof and to Docket Case. Filed Mar. 19, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Private Corporation,
Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time to [July 17, 1913, to] File
Record Thereof and Docket Cause.**

Good cause therefor appearing, it is hereby ordered that the plaintiff in error may have to and including the 17th day of July, 1913, within which to

file their record on writ of error and to docket this cause with the Clerk of the above-entitled court.

WM. C. VAN FLEET.

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and

WM. M. CANNON,

Attorneys for Defendant in Error.

[Endorsed]: No. —. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Private Corporation, Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Order Extending Time. Filed Apr. 18, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER

COMPANY, a Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

Order Extending Time [to September 17, 1913, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby ordered that the plaintiff in error may have to and including the 17th day of September, 1913, within which to file its record on writ of error and to docket this cause with the Clerk of the above-entitled court.

Dated this 17 day of July, 1913.

WM. W. MORROW,
U. S. Circuit Judge.

Defendant in error hereby consents to the making
of the above order.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. Dept. No. ——. In the
United States Circuit Court of Appeals in and for
the Ninth District. Balaklala Consolidated Copper
Co., etc., Plaintiffs in Error, vs. Fred Whitsett, De-
fendant in Error. Order Extending Time. Filed
Jul. 17, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Private Corporation,
Plaintiff in Error,
vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time [to September 18, 1913, to
File Record Thereof and Docket Cause].**

Good cause therefor appearing, it is hereby
ordered, that the plaintiff in error may have to
and including the 18th day of September, 1913,
within which to file its record on writ of error and to
docket this cause with the Clerk of the above-
entitled court.

Dated at San Francisco, California, this 18th day of August, 1913.

WM. C. VAN FLEET,
Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. —. In the United States Circuit Court of Appeals, for the Ninth Circuit. Balaklala Consolidated Copper Company, etc., Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Order Extending Time to File Writ of Error and to Docket Cause. Filed Aug. 18, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

Order Extending Time [to October 20, 1913, to File Record Thereof and Docket Cause].

Good cause therefor appearing, it is hereby ordered, that the plaintiff in error may have to and including the 20th day of October, 1913, within which to file its record on writ of error and to docket

this cause with the clerk of the above-entitled court.

Dated: September 17th, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making
of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. — United States Circuit Court
of Appeals, Ninth Circuit. Balaklala Consolidated
Copper Company, etc., Plaintiff in Error, vs. Fred
Whitsett, Defendant in Error. Order Extending
Time. Filed Sep. 8, 1913. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time [to November 20, 1913, to
File Record Thereof and Docket Cause].**

Good cause appearing therefor, it is hereby
ordered that the plaintiff in error may have to and
including the 20th day of November, 1913, within
which to file its record on writ of error and to doc-
ket this cause with the Clerk of the above-entitled
court.

Dated: October 20th, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making
of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No.—. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc., Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Order Extending Time. Filed Oct. 20, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time [to December 20, 1913, to
File Record Thereof and Docket Cause].**

Good cause appearing therefor, it is hereby ordered that the plaintiff in error may have to and including the 20th day of December, 1913, within which to file its record on writ of error and to docket this cause with the Clerk of the above-entitled court.

Dated this 19th day of November, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making
of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit
Court of Appeals in and for the Ninth Circuit. Bal-
aklala Consolidated Copper Co., etc., Plaintiff in
Error, vs. Fred Whitsett, Defendant in Error. Or-
der Extending Time. Filed Nov. 20, 1913. F. D.
Monckton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time [to December 27, 1913, to
File Record Thereof and Docket Cause].**

Good cause appearing therefor, it is hereby
ordered, that the plaintiff in error may have to and
including the 27th day of December, 1913, within
which to file its record on writ of error and to docket
this cause with the Clerk of the above-entitled court.

216 *Balaklala Consolidated Copper Company*

Dated this 20th day of December, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making
of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc., Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Order Extending Time. Filed Dec. 20, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

No 15,143.

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time [to January 27, 1914, to File
Record Thereof and Docket Cause].**

Good cause appearing therefor, it is hereby ordered, that the plaintiff in error may have to and including the 27th day of January, 1914, within which to file its record on writ of error and to docket this cause with the Clerk of the above-entitled court.

Dated this 27th day of December, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making
of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. 15,143. In the United States
Circuit Court of Appeals in and for the Ninth Cir-
cuit. Balaklala Consolidated Copper Co., a Private
Corporation, Plaintiff in Error, vs. Fred Whitsett,
Defendant in Error. Order Extending Time. Filed
Dec. 27, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time [to Febry. 26, 1914, to File
Record Thereof and Docket Cause].**

Good cause therefor appearing, it is hereby ordered,
that the plaintiff in error may have and it is hereby
granted thirty (30) days from and after the 27th
day of January, 1914, within which to file its record
on writ of error and docket this cause with the Clerk
of the above-entitled court.

Dated this 27th day of January, 1914.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Defendant in Error.

[Endorsed]: No. —. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc., Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Order Extending Time. Filed Jan. 27, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

Order Extending Time [to March 15, 1914, to File Record Thereof and Docket Cause].

Good cause appearing therefor, it is hereby ordered, that the plaintiff in error may have to and including the 15th day of March, 1914, within which to file its record on writ of error and to docket this cause with the Clerk of the above-entitled court.

Dated: February 26th, 1914.

M. T. DOOLING,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

WM. M. CANNON and
C. S. JACKSON,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Private Corporation, Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Order Extending Time. Filed Feb. 26, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

Order Extending Time [to April 15, 1914, to File Record Thereof and Docket Cause].

Good cause appearing therefor, it is hereby ordered, that the plaintiff in error may have to and including the 15th day of April, 1914, within which to file its record on writ of error and to docket this cause with the Clerk of the above-entitled court.

Dated: March 16, 1914.

WM. C. VAN FLEET,
United States District Judge.

220 *Balaklala Consolidated Copper Company*

Defendant in error hereby consents to the making of the above order.

WM. M. CANNON and
C. S. JACKSON,

Attorneys for Defendant in Error.

[Endorsed]: In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Private Corporation, Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Order Extending Time. Filed Mar. 16, 1914. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals in and
for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO., a
Private Corporation,

Plaintiff in Error,

vs.

FRED WHITSETT,

Defendant in Error.

**Order Extending Time [to May 10, 1914, to File
Record Thereof and Docket Cause].**

Good cause appearing therefor, it is hereby ordered, that the plaintiff in error may have to and including the 10th day of May, 1914, within which to file its record on writ of error and to docket this cause with the Clerk of the above-entitled court.

Dated: April 10th, 1914.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and
W. M. CANNON,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Private Corporation, Plaintiff in Error, vs. Fred Whitsett, Defendant in Error. Order Extending Time. Filed Apr. 11, 1914. F. D. Monckton, Clerk.

No. 2419. United States Circuit Court of Appeals for the Ninth Circuit. Sixteen Orders Under Rule 16 Enlarging Time to May 10, 1914, to File Record Thereof and to Docket Case. Refiled May 9, 1914. F. D. Monckton, Clerk.

No. 2419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER
COMPANY (a corporation),
Plaintiff in Error,

VS.

FRED WHITSETT,
Defendant in Error.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

C. H. WILSON,
Attorney for Plaintiff in Error.

Filed this.....**Filed**.....day of October, 1914.

OCT 5 - 1914 FRANK D. MONCKTON, Clerk.

F. D. Monckton,.....Deputy Clerk.



No. 2419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER COMPANY (a corporation), <i>Plaintiff in Error,</i>	}
VS.	
FRED WHITSETT, <i>Defendant in Error.</i>	

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action brought to recover damages for personal injuries. At the time complained of, March 9th, 1909, the defendant corporation was engaged in the business of mining and operating a quartz mine situate in the County of Shasta, State of California.

The plaintiff and his twin brother, Frank Whitsett, were employed by the defendant to operate a Burleigh drill in its mine. Frank was an experi-

enced miner and was known as a machine man (Record, pp. 56, 74, 75). Plaintiff was a machine man's helper, or chuck tender (Record, p. 65) and had worked for the defendant as a miner during a period of six weeks prior to the accident (Record, p. 68). The Burleigh drill is a machine operated by compressed air that drills holes in rock or ore preparatory to blasting. The machine man operated the valve that let the compressed air into the machine and by means of a screw, turned by a crank, kept the point of the drill in contact with the rock or ore (Record, pp. 49 and 70). The chuck tender was required to take a drill out of the chuck whenever necessary and put in another, and it was also his duty to pour water into the hole made by the drill while it was in operation (Record, pp. 49 and 71). These two brothers changed about in their work from time to time, so that they alternately worked as drill man and chuck tender (Record, pp. 49 and 70). At the time of the accident plaintiff was operating the drill and Frank was the chuck tender (Record, p. 66). Ordinarily, a round of a dozen holes was drilled, four at the top, four in the middle and four at the bottom of the face of the drift or cross-cut, the bottom four being called lifters (Record, p. 68). When the drilling was completed the holes were filled with dynamite, and there was a cap and fuse for each hole. As the men went off shift, the fuses were lighted, and by the time the men had reached places of safety, the explosion took place, blasting the rock out roughly

in the shape of the drift or cross-cut (Record, p. 68). After a blast a man came with an iron or steel bar and loosened all of the rock that had not completely fallen away from the face of the drift or cross-cut, so that the same could be shoveled up by the muckers. This was called "barring down". The man employed for this work in the shift in which the Whitsett brothers worked, was named Yokum. It was also his duty to examine the face of the drift or cross-cut as far down as the accumulation of muck at the bottom of the same would permit, for the purpose of discovering or detecting missed-shots (Record, pp. 98, 78 and 79). It was not his duty to examine below the pile of muck for missed-shots (Record, pp. 78, 79, 98). Defendant contended that the duty of examining the lower part of the face rested upon the miners—particularly the machine men—after the removal of the muck (Record, pp. 75 and 76). The muckers, or laborers, removed the muck or broken rock after each blast (Record, p. 76). The operation of clearing the muck from any one place required a shift, and sometimes more than a shift, so that a round of holes blasted at the end of one shift might not be cleared away by the end of the following shift (Record, p. 78). A month or more prior to the accident a drift or tunnel had been cut in the mine, and from this drift or tunnel a cross-cut was being made by the Whitsett brothers and their opposite shift at the time of the accident (Record, p. 77). In the face of the cross-cut one round of holes had been drilled and blasted, break-

ing the rock out to a depth of three or three and one-half feet. This first blast had taken place some time before the Whitsett brothers went to work at the cross-cut (Record, pp. 74 and 76), and they were, therefore, engaged in drilling the second round of holes at the time of the accident (Record, p. 94). The first work that the Whitsett brothers did at this place was on the night preceding the accident, when they drilled five holes. They then went off shift and in due time the day shift came on work,—the defendant worked but two shifts in its mine. The drilling was continued by the day shift, so that when the Whitsett brothers went to work on the night shift following, there were but two holes and a part of a third yet to drill. These were the lifters (Record, p. 68). The Whitsett brothers began work on the uncompleted hole, and as they were drilling the same, the drill struck and exploded a missed-shot, or missed-hole, that is to say, a charge of dynamite that had not been exploded in the preceding blast. In this explosion Frank was killed and Fred was much injured. This action, as has been stated, is brought to recover damages for the personal injuries sustained by Fred. The administrator of the estate of Frank maintains his separate action to recover damages for the death (see Record on Appeal in Case No. 2420 before this Court).

The amended complaint charges the defendant with negligence in failing to exercise ordinary care to provide a safe, suitable and proper place for

plaintiff to perform his labor, and also with negligence in failing to provide a careful and competent man "to locate, mark and report to the oncoming shift unexploded charges of powder, and determine the safety of the place they were to work in", and that plaintiff's injury was caused by the negligence of said missed-shot detective.

The original complaint, filed March 8th, 1910, alleged that plaintiff was injured through the negligence of the defendant in failing to provide and maintain for him a safe, suitable and proper place in which he could perform his labor. It contained no reference to the missed-hole man, and did not allege that the accident and injury complained of was due to the carelessness of an incompetent fellow employe (Record, p. 2).

In its answer defendant admits the accident and injury, but denies the negligence, and denies that it could have discovered and known of the missed-shot; and as a separate and further defense the defendant alleges that any cause of action set forth in the amended complaint "based on the alleged failure and neglect of this defendant to provide a careful and competent missed-hole man was not pleaded or alleged until the filing of plaintiff's amended complaint herein, more than a year after the accident and injury complained of, and that as to said cause of action, the same is barred by the provisions of Section 340 of the Code of Civil Procedure" (Record, p. 38).

The case was joined with that of J. E. Reardon, Administrator of the Estate of Frank Whitsett, deceased, for trial, both cases being tried before the same jury. This case resulted in a verdict in favor of the plaintiff and against the defendant in the sum of five thousand dollars. Separate motions for new trial were duly made and denied, and separate writs of error to the Court below were duly obtained, and both cases are now before this Court on writs of error. In the Court below the main issue was whether or not the accident was proximately caused by any negligence on the part of the defendant, plaintiff contending that it was the duty of the defendant to exercise ordinary care to discover the missed-shot, while the latter insisted that under the circumstances, there was no duty on its part to furnish deceased with a safe place in which to work, and that it could properly delegate to Yokum and to Frank Whitsett and to the plaintiff the duty of looking for and detecting the missed-shot. Furthermore, defendant contended that the missed-shot in this instance was so concealed that it was impossible by any ordinary or practicable method to discover the same.

Before this Court the plaintiff in error relies on the following

SPECIFICATIONS OF ERROR,

which are urged by it as grounds for the reversal of the judgment of the District Court:

I.

That the District Court erred in permitting counsel for the plaintiff to state, in the presence of the jury: "In this case, there is certain indemnity insurance against this kind of action, and the insurance company is defending through its own counsel, this action. Therefore, I have a right to inquire." And that counsel for plaintiff was guilty of misconduct in making said statement in the presence of the jury. That defendant objected to said statement and to the conduct of counsel in making said statement, which objection was overruled by the Court and the defendant then and there excepted thereto, which exception was duly allowed by the Court, constituting the First Assignment of Error (Record, pp. 148, 149).

II.

That on May 15th, 1912, and while the jury was being empaneled in the above entitled action during the examination of N. S. Arnold, a talesman on his *voir dire* by counsel for plaintiff, the following proceedings were had:

"MR. CANNON. Q. Have you any connection, either as a stockholder, or otherwise, with an indemnity company or organization for the purpose of insuring people against personal injuries?"

MR. WILSON. I object to that question as immaterial.

MR. CANNON. I do not think it is immaterial. I would like to state why I ask the question.

The COURT. What is the reason?

Mr. CANNON. The reason is——

Mr. WILSON. I object to the reason being stated.

The COURT. I am asking for it.

Mr. CANNON. In this case there is certain indemnity insurance against this kind of action and the insurance company is defending through its own counsel, this action. Therefore, I have a right to inquire.

Mr. WILSON. I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

Mr. WILSON. We now move the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT. The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel unless it should appear it is a pertinent fact."

That the Court erred in refusing to discharge the jury on motion of defendant's counsel, constituting the Second Assignment of Error (Record, pp. 149, 150).

III.

The following question was then propounded to said N. S. Arnold, a talesman, on his *voir dire*:

"Mr. CANNON. Q. Have you any connection, either as a stockholder or otherwise, with any indemnity company as I have described?

Mr. WILSON. We insist upon our objection.

The COURT. I overrule the objection.

Mr. WILSON. I will take an exception."

That the Court erred in permitting said question and in allowing counsel to bring before the jury

notice and information of the fact that this action was defended by an indemnity company and that defendant was protected by indemnity insurance, constituting the Third Assignment of Error (Record, p. 150).

IV.

That after the jury was sworn to try the above entitled cause and before testimony was introduced in said cause, defendant, by its counsel, moved the Court for an order requiring that plaintiff elect between the two causes of action set forth in the complaint, to wit: One cause of action stated in the only count of the complaint on the theory that defendant had failed to furnish a safe place in which to work, and the second in the same count on the theory that defendant had failed to furnish a competent co-employee, the violation of which one or either of these duties giving to the plaintiff a cause of action and each of them being separate delicts. That said motion, when made, was denied by the Court.

That said defendant then and there excepted to said denial of said motion, and that the ruling of the Court thereon constitutes the Fourth Assignment of Error (Record, p. 151).

V.

That the part of the amended complaint of plaintiff wherein he pretends to set forth a cause of action based on the alleged failure and neglect of

the defendant to provide a careful and competent missed-hole man, was not pleaded or alleged until the filing of plaintiff's amended complaint herein, more than one year after the accident and injury complained of, and that as to such cause of action, the same is barred by the provisions of Section 340 of the Code of Civil Procedure.

VI.

That thereupon defendant made its motion to strike out all of the testimony in this case as to the competency of the man Yokum, and all of the testimony in the case as to his being intoxicated, or seen intoxicated, on the ground that it is not shown that Yokum was intoxicated on the day of the accident, and that it was not by reason of the intoxication of Yokum that no proper inspection of the face of the drift—cross-cut—was had, and that it is not shown that he had at any time on that day inspected the face in question, and that it is not shown that such evidence tended to prove the negligence or incompetency or the impairment of the ability of Yokum, and that it is not shown that it was by reason of Yokum's drinking habits that he was careless or unfit, or ever at any time overlooked a missed-hole, and on the ground that it does not appear that Yokum had had anything to do with the work of inspecting the drift or face in which the accident occurred, and that it was not shown that a missed-shot had exploded, which caused the accident and injury complained of.

That the Court denied said motion to strike out the evidence relating to said Yokum and as to his intoxication and incompetency, to which ruling the defendant then and there excepted.

That the Court erred in denying said motion, constituting Error No. twenty-six (Record, pp. 161, 162).

VII.

That thereupon defendant made its motion for a nonsuit, as follows:

“And in the Fred Whitsett case we make the further motion that an order of nonsuit be made and entered therein upon the ground, first, that the plaintiff has wholly failed and neglected to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; second, upon the ground that there is no evidence in this case that the missed-shot man or the man Yokum was habitually intoxicated, or that his services were rendered inefficient by reason of any intoxication upon his part, or that the defendant knew, or had reason to know of his habits of intoxication; nor is there any evidence to show that at the time of the accident and injury complained of, or immediately before that time, Yokum inspected the place where the accident occurred and at that time was under the influence of liquor or inefficient in any way or manner, whatsoever; and on the third ground that there is no evidence in this case to show that by any act or omission on the part of the defendant the plaintiff was furnished with an unsafe place in which to work.”

That said motion was then denied, and the defendant then and there excepted thereto.

That the Court erred in denying said motion, constituting Error No. twenty-seven (Record, pp. 162, 163).

VIII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 1 of the instructions requested by the defendant):

“You are instructed by the Court that on the evidence and under the law, you will return a verdict in this case for the defendant.”

Which request was refused, to which ruling the defendant then and there excepted.

That the Court erred in refusing to give such instruction, constituting the fortieth Assignment of Error (Record, pp. 169, 170).

IX.

That the District Court erred in overruling and denying the petition of defendant for a new trial herein, to which ruling the defendant duly excepted.

That the Court erred in denying said petition for a new trial, constituting the fifty-fifth Assignment of Error (Record, p. 182).

X.

Prior to the argument to the jury the defendant duly requested in writing that the Court should

give to the jury the following instruction (the same being numbered 8 of the instructions requested by the defendant):

“I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses.”

Which request was denied, and to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the forty-fourth Assignment of Error (Record, p. 172).

XI.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 9 of the instructions requested by the defendant):

“It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employer knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you

that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers."

Which request was refused, to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the forty-fifth Assignment of Error (Record, p. 173).

XII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 26 of the instructions requested by the defendant):

"If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident oc-

curred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the defendant.”

Which request was refused, to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, constituting the forty-eighth Assignment of Error (Record, pp. 175, 176, 177).

XIII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same

being numbered 31 of the instructions requested by the defendant):

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted, the error of the Court in refusing to so charge the jury constituting the forty-ninth Assignment of Error (Record, pp. 177, 178).

XIV.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 32 of the additional instructions requested by the defendant):

“If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine, where he was engaged to labor, and if you further find that the accident complained of

was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, the error of the District Court in refusing to so charge the jury constituting the fiftieth Assignment of Error (Record, pp. 178, 179).

XV.

On the close of the testimony and before the jury retired for deliberation, the Court gave its certain instructions to the jury, and when said instructions of the Court were so given to the jury, and before the jury was retired for deliberation the defendant duly excepted to the action of the Court in instructing the jury as follows:

"In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a 'missed-hole man', and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck tender regularly set at work by his superior at any place where it

was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself."

Upon the ground that the same is contrary to law.

That the error of the District Court in so charging the jury now constitutes the fifty-first Assignment of Error (Record, pp. 179, 180).

Argument.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

These specifications of error pertaining to the alleged misconduct of counsel for plaintiff in stating in the presence of the jury that this action is defended by an insurance company, may be considered together.

The record shows that during the examination by Mr. Cannon of N. S. Arnold, a talesman, on his *voir dire*, and who subsequently sat as a juror in this cause, the following proceedings were had:

"Q. Have you any connection either as a stockholder or otherwise with an indemnity company, or organization for the purpose of insuring people against personal injuries?

Mr. WILSON. I object to that question as immaterial.

Mr. CANNON. I do not think that it is immaterial. I would like to state why I asked the question.

The COURT. What is the reason?

Mr. CANNON. The reason is——

Mr. WILSON. I object to the reason being stated.

The COURT. I am asking for it.

Mr. CANNON. In this case there is certain indemnity insurance against this kind of accident, and the insurance company is defending, through its own counsel, this action; therefore, I have a right to inquire——

Mr. WILSON. I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

The COURT. I will develop what the fact is; I will instruct the jury that they pay no attention to anything of that kind. I am bound to know the theory on which the question is asked, when it is objected to, especially. That is why I asked the reason.

Mr. WILSON. We insist on the error.

The COURT. You have your right to reserve your exception. I overrule your objection.

Which ruling defendant now assigns as
Error No. 1.

Mr. WILSON. We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT. The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact.

Which ruling defendant now assigns as
Error No. 2.

Mr. CANNON. Q. Have you any connection, either as a stockholder, or otherwise, with any indemnity company such as I have described?

Mr. WILSON. We insist upon our objection.

The COURT. I overrule the objection.

Mr. WILSON. I will take an exception.

The COURT. They have a right to inquire into facts of that kind. It might affect a juror's fairness, and it might turn out that some of them were stockholders in some such company.

Mr. WILSON. The Supreme Court of this State has decided otherwise.

The COURT. The objection is overruled.

Which ruling defendant now assigns as

Error No. 3."

(Record, pp. 44-46.)

Reduced to a simple proposition, the objection is that Mr. Cannon stated, in the presence of the jury that heard and determined this case, that the defendant was indemnified by insurance and that the insurance company was defending the case through its own counsel. These facts could not have been proved by him in the course of the trial, and it was misconduct for him to inform the jury of them. The Court, instead of then and there instructing the jury to disregard these matters, stated that it would develop the facts and that it would instruct the jury to pay no attention to the same, unless they should appear as pertinent facts.

No evidence was introduced on the subject and it did not appear in the evidence or otherwise, except through the statements complained of, that the defendant is insured and that the insurance company is defending this case. The facts were

not made to appear pertinent. Notwithstanding, the Court, overlooking its promise, wholly failed and neglected to instruct the jury relative to the matter. Defendant's counsel, of course, had a right to rely upon the promise of the Court in that particular, and the obvious misconduct of counsel, coupled with the neglect of the Court, prejudiced the defendant to the extent that its demands for a new trial must be granted.

It is reversible error for counsel to bring to the attention of the jury, at any time or in any manner, the fact that the defendant is insured as against the accident sued on, and in that connection, I beg to refer to the case of

Eckhart etc. Co. v. Schaeffer, 101 Ill. App. 500.

In that case, in the examination of the jury, one of the veniremen was asked if he was connected with the Fidelity and Casualty Company, and thereupon plaintiff's counsel said: "I may state, gentlemen, that the Fidelity and Casualty Company are defending this case." On the examination of another jurymen, a similar statement was made by counsel for plaintiff, and then addressing counsel for defendant: "You are the attorney for the Fidelity and Casualty Company, are you not?" And, after objection: "I mean in this particular case he is the attorney for the Fidelity and Casualty Company." And again: "Mr. Dynes, isn't it a fact that the Fidelity and Casualty Company will pay any judgment rendered in this

case?" And again: "Do you know Mr. Dynes here, who sits here, the attorney for the Fidelity and Casualty Company?" And again: "Now, this case is defended by the Fidelity and Casualty Company." And again: "Do you know their attorney here, Mr. Dynes or Mr. Williams?" The Court in its opinion, says:

"It sufficiently appears from the foregoing that the attorneys for the plaintiff (appellee here), not satisfied with asking jurors whether they knew any one connected with the Fidelity and Casualty Company, which question they had the right to ask, for the purpose of a peremptory challenge, and which was not objected to, proceeded further, and stated to the jurors that the Fidelity and Casualty Company was defending the case, and also stated that Mr. Dynes, who is appellant's attorney, was the attorney of the Fidelity and Casualty Company in this case in the trial court. And the court, by overruling the objections of appellant's attorneys to such statements, stamped the statement with the court's approval, so that they went to the jury with all the force and effect of evidence. Mr. Dynes was the attorney of record for appellant and the Fidelity and Casualty Company was not a party to the record. If it were a fact that the Fidelity and Casualty Company was defending the suit, it would not be competent to prove that fact, for the plain reason that such proof would not tend, in any degree, to sustain the issues; it would be totally irrelevant. It is, therefore, plain that the attorneys, presumably learned in the law, could not have made the statements in question for any legitimate purpose, and while we will not say that they were made for an illegitimate purpose, and

to prejudice the jury, we are of opinion that they were well calculated to have that effect."

And a judgment for the plaintiff was reversed.

The case of

Fuller v. Darragh, 101 Ill. App. 664,

is a similar case. Misconduct was charged against the plaintiff's counsel in telling the jury, at the time of their examination *voir dire*, that he understood that an insurance company was defending the case. And the Court in its opinion, says:

To the proper conduct of jury trials one thing is absolutely essential, viz., a recognition of the principle that at the bar of justice all men are equal.

"All causes are to be tried; all questions determined upon matters pertinent thereto, and not upon considerations which in the controversy ought not to be mentioned.

"If verdicts are to be rendered or judgments to be given for plaintiffs because they are popular, or their manner of living, business, lineage, association or benevolence commends them to the community, or against defendants for the reason that they hold opinions, advocate ideas or engage in enterprises distasteful to many, then is our whole system of jurisprudence a mockery and a delusion.

"None of the learned counsel for appellee will gravely contend that whether appellant had procured insurance against liability for accidents, or whether the suit under consideration was being defended by an insurance

company or its attorney, could possibly throw any light upon the question of whether the injury to appellee had been occasioned by actionable negligence of appellant.

“Why, then, should the jury be told that the defense was made by a casualty insurance company? If this can be done, why may not a jury be told that the action is prosecuted by a corporation created to hunt up and prosecute accident cases, or by an attorney for a contingent fee; and that one-half of any verdict rendered for the plaintiff will go to such corporation or to his attorney?”

“It is urged that this statement was made for the purpose of selecting a disinterested jury.

“Jurors may be asked if they know certain persons or have business or other relations with them, but under the guise of obtaining a fair jury, information calculated to prejudice jurors against either party cannot be given, and the trial court should not only prevent this, but if satisfied that despite its rulings jurors have thus been swerved in the considerations, should set aside verdicts so obtained.

“If a plaintiff, so unfortunate as to have had a father convicted of horse stealing and a mother of child stealing, comes into court asking that there be rendered to him what he believes to be his due, jurors cannot be asked if they know his father, lately sentenced for larceny, or his mother, in the penitentiary for a most heinous offense.

“Counsel had no right to tell the jury that he understood that an insurance company was defending the case.”

The case of

Lipschutz v. Ross, 84 N. Y. Supp. 632,

is of the same character. It is said in the opinion in that case:

“The action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff by being struck by a vehicle and horse which were owned by defendant and driven by defendant’s employee. The cause came on for trial before one of the justices of the City Court. Twelve talesmen were called to act as jurors in the case, and, after taking their seats in the jury box, and while being examined by counsel for the plaintiff for the purpose of ascertaining whether or not they were acceptable, plaintiff’s counsel asked whether any of the jury were interested in the Travelers’ Insurance Company of Hartford, Conn. This was objected to, and the objection was overruled. One of the jurymen then stated that he, as an agent of that insurance company, had sold insurance policies. Thereupon, in the presence and hearing of the jurors statements were made by the court and counsel, and exceptions taken thereto as follows:

‘PLAINTIFF’S COUNSEL. I want to see whether any of the jury are connected with said insurance company. It now appears that one of the jurors is an agent of this very company, and I understand that this case is being defended by the Travelers’ Insurance Company.

‘DEFENDANT’S COUNSEL. I think the statement made by the counsel to the effect that he understands there is an insurance company interested in this case is prejudicial to the interests of the defendant in this action, and I

ask that the case be withdrawn from this jury, and sent to another for trial.

‘The COURT. I will overrule your objection, and give you an exception.

‘(Exception taken by defendant’s counsel.)

‘The COURT. Assuming that an insurance company is interested in this case, I think the plaintiff has a right to find that out.

‘(Exception taken by defendant’s counsel. The jury was then accepted and sworn.)’

“We are of the opinion that the statements made by the plaintiff’s counsel and the court in the presence of the jurors impanelled to try the case were prejudicial to the defendant and constituted error, which requires a reversal of the judgment.”

In the case of

Manigold v. Black River Co., 80 N. Y. Supp.
862,

the Court said:

“The law is well settled that it is improper to show in an action of negligence that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore*, 66 Hun. 630 (22 N. Y. Supp. 1119). *It is not proper to inform the jury of such fact in any manner.* It is not material to any issue involved in the trial of the action, and certainly plaintiff’s counsel ought not to be permitted to do indirectly what he would not be permitted to do directly.”

The case of

Lone Star etc. Co. v. Voith (Tex.), 84 S. W.
1100,

was reversed because of the persistent efforts of plaintiff's counsel, from the beginning to the close of his argument, to get before the jury the fact that the defendant was insured by such insurance company against loss by reason of plaintiff's injuries.

A similar case is that of

Coe v. Van Why, 33 Colo. 315; 80 Pac. 894.

See also:

Casselmon v. Dunfee, 172 N. Y. 507;

Barrett v. Bonham Oil Co. (Tex.), 57 S. W. 602;

Iverson v. McDonnell, 36 Wash. 73; 78 Pac. 202;

Sawyer v. Arnold Shoe Co., 90 Me. 369; 38 Atl. 333;

Waldrick v. Moore, 22 N. Y. Supp. 1119;

Gass etc. Co. v. Robertson (Ind.), 100 N. E. 689;

Van Buren v. Mountain Copper Co., 123 Fed. 61;

Roche v. Llewellyn Iron Works, 140 Cal. 574.

The case at bar comes squarely within these authorities. Mr. Cannon, most learned in the law, and, particularly, in the law of negligence cases, must have known that no evidence could be introduced on the trial for the purpose of showing that the defendant is indemnified against any judgment that plaintiff may obtain in this case, yet,

he forced the way to make a statement to that effect before the jury. Such information, so conveyed to the jury, could have had but one purpose,—the sinister purpose of prejudicing the jury against the defendant. The trial Judge, instead of promptly instructing the jury to disregard all the facts so stated by Mr. Cannon, declared that he would instruct “the jury to pay no attention to the remark of counsel, *unless it should appear to be a pertinent fact.*” This did not appear. The Judge did not “instruct the jury to pay no attention to the remark of counsel.” The jury were left to conclude that the insurance was a fact and that that fact was pertinent to the case. The matter went to the jury with all the force and effect of evidence, emphasized by the objection and discussion, and stamped with the approval of the Court. The error is more glaring and prejudicial than those complained of in the cases above cited.

II.

THE FOURTH ASSIGNMENT OF ERROR.

After the jury was sworn to try this case, defendant by its counsel

“moved the Court for an order requiring that plaintiff elect between the two causes of action set forth in the complaint, to wit, one cause of action stated in the only count of the complaint on the theory that defendant had failed to furnish a safe place in which to work, and

the second in the same count on the theory that the defendant had failed to furnish a competent co-employee, the violation of which one or either of these duties giving to the plaintiff a cause of action, and each of them being separate delicts”.

The motion was denied. We have seen that the amended complaint charges the defendant with negligence in failing to furnish plaintiff with a safe place in which to do his work, and also in knowingly having in its employ an incompetent missed-hole man (Record, pp. 24, 25). These are distinct breaches of duty. As said in the case of

Donnelly v. San Francisco Bridge Co., 117

Cal. 423:

“The master’s duties to his employees are three: First, to supply them with suitable appliances for their labor; second, to afford them a reasonably safe place in which to perform their tasks; and, third, to use due care in the selection of fit and competent fellow employees.”

A breach of any one of these duties constitutes a cause of action. A cause of action is held to be a union of the right of plaintiff and its infringement by the defendant.

1 Enc. Pl. & Pr., p. 116.

In actions for tort the test to be applied to determine whether there is more than one cause of action where damages have been inflicted by one wrongful act, is: Was the injury occasioned by an infringement of different rights? If it was,

there are as many rights of action as separate rights infringed. Supporting this rule in this State we have the case of

Baker v. Ry., 114 Cal. 501-509;

in other jurisdictions,

Laporte v. Cook, 20 R. I. 261;

McHugh v. St. Louis Transit Co., 190 Mo. 85; 88 S. W. Rep. 853; 40 Am. & Eng. Ry. Cas. 349;

2 *Labatt Master and Servant*, Sec. 861;

4 *Labatt Master and Servant* (2 Ed.), Sec. 1633,

in which text book, speaking of pleading, it is said:

“A count is bad for duplicity where it alleges several distinct and independent breaches of duty. These allegations should each be made the subject of a separate count, if the plaintiff desires to rely thereon.”

In the case of

Laporte v. Cook, above cited,

the court says:

“The second count is bad for duplicity, in that it sets up several distinct and independent breaches of duty, viz: (1) Neglect to furnish proper safeguards for the protection of the plaintiff; (2) Neglect to give him suitable instructions; and (3) Neglect to provide proper persons to take charge of the work. These allegations should each be made the subject of a separate count, if the plaintiff desires to rely thereon. See *Steph. Pl.* (Heard) 251; *Gould Pl.*, 3 Ed. 219, Sec. 99, 419, Sec. 1.”

In the case at bar the distinction between the two causes of action set out is obvious when we consider that the duty to furnish a reasonably safe place in which to work is a personal duty of the employer, which cannot be delegated in any manner to relieve him from responsibility for its negligent performance, the employer theoretically, at least, being liable for his own negligence, whereas, in the other case, the right to recover is predicated upon the negligence of a fellow-servant, the plaintiff being relieved against the defense of a fellow-servant's negligence on the ground that the employer was also at fault in employing the culpable fellow-servant.

The Code of Civil Procedure of the State of California, Sec. 430, Subd. 5, requires separate causes of action to be separately stated. A demurrer was filed in the case directed to this condition of the amended complaint (Record, p. 29). The demurrer should have been sustained. It was, however, overruled (Record, p. 32). In this situation, defendant's proper remedy was to make the motion under consideration.

Cheney v. Fisk, 22 How. Pr. (N. Y.) 238;

Otis v. Mechanics Bank, 35 Mo. 131;

Mooney v. Kennett, 19 Mo. 555;

Offield v. Wabash etc. Co., 22 Mo. App. 608;

Giacomo v. New York etc. R. Co., 196 Mass.

192; 81 N. E. 899;

of error, which is the refusal of the trial Court to instruct the jury to return a verdict for the defendant (Record, p. 169), and the fifty-fifth assignment of error, which is the ruling of the Court denying defendant's petition for a new trial (Record, p. 182).

The amended complaint, upon which plaintiff went to trial, charges in paragraph four that the defendant

“failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for plaintiff to perform his said labor aforesaid, and failed and neglected to provide a careful and competent man, and had in their employ at that time a man known to the defendant to be unreliable and careless, whose express duty it was to locate, mark and report to the oncoming shift unexploded charges of powder, and determine the safety of the place they were to work in, and particularly in this:”

Then follows a description of the place of the accident in which, it is stated, that the plaintiff and his brother, Frank, went to work under the orders and directions of the defendant to complete an unfinished hole in the face of the cross-cut,

“and while so engaged the drill so operated by plaintiff and his driller ran into and exploded a charge of powder then and at all times theretofore unknown to the plaintiff or his driller, and of which the defendant was charged with knowledge and notice thereof, which knowledge or notice thereof defendant failed and neglected to communicate to plaintiff or his driller.”

The fifth paragraph in part is as follows:

“That the defendant then had in its employ, as heretofore alleged, a man designated as the ‘missed-hole man’, whose express duty is to examine the place where the oncoming shift is to work to ascertain its safety and is free from danger, and locate, mark and report to the oncoming shift all unexploded charges of powder, if any. That the defendant, though it had ample time and opportunity so to do, failed and neglected and did not use due care to mark or report to plaintiff’s oncoming shift, said, or any unexploded charges of powder, and the defendant then and there carelessly and negligently performed its duty in that behalf, leaving plaintiff to believe that a proper examination of said place where plaintiff was directed to work as aforesaid, had been made and that the same was free from danger and safe to pursue the work of completing the unfinished hole he was ordered and directed to do. That the missed-hole man then in the defendant’s employ whose duty it was to locate unexploded charges of powder and report as aforesaid, was careless and incompetent and known to be so by the company, the defendant company, and addicted to the drink habit.”

After which follows a description of the injuries sustained by the plaintiff (Record, pp. 24, 25).

The allegations of negligence are denied in the answer (Record, pp. 34-36).

Under these pleadings the burden of proving the alleged negligence is on the plaintiff, and there is no presumption of negligence arising from the mere fact of the accident or death.

Sappenfield v. Railway, 91 Cal. 56;

Puckhaber v. Railway, 132 Cal. 364;

Patterson v. Railway, 147 Cal. 183;

Thompson v. Cal. Construction Co., 148 Cal. 40.

The defendant was not an insurer of plaintiff against accidental injury. Its obligation was to use ordinary care, and ordinary care in this connection means such care as prudent employers in the same line of business ordinarily use under the same circumstances.

Sappenfield v. Railway, 91 Cal. 56;

Brymer v. Southern Pacific Co., 90 Cal. 498;

Brett v. Frank & Co., 153 Cal. 272.

And, as indicated in the amended complaint, the defendant's negligence is to be measured by its knowledge or means of knowledge of the defect complained of.

Sappenfield v. Railway, 91 Cal. 57;

Brymer v. Southern Pacific Co., 90 Cal. 498.

If the defect was such as to deceive human judgment, in other words, if, by the exercise of the ordinary care above mentioned, the defendant did not, or could not, have discovered the defect complained of, then it is not liable.

Thompson v. Cal. Construction Co., 148 Cal. 39;

Malone v. Hawley, 46 Cal. 414.

The jury are not permitted to guess that defendant was negligent, or that it could,—through any of its officers,—have seen an unexploded blast

that the workmen themselves were unable to discover.

Puckhaber v. So. Pacific Co., 132 Cal. 366.

Yokum, the missed-shot man, was employed by the defendant as an extra precaution. Such a man is not ordinarily employed by mining companies under similar circumstances (Record, pp. 105, 107, 108, 111).

As is obvious, the best time to examine the face of the drift or cross-cut, for the purpose of discovering missed-shots, was after the muck had been removed, but the exigencies of mining sometimes required Yokum, the missed-shot man, to examine the face before the muck had been cleared away (Record, pp. 78 and 102). In such case he would examine as far down as possible, that is to say, as far down as the muck, but it was not his duty to clear away the muck and examine beneath it (Record, p. 79), it being clear from the evidence that it would be a physical impossibility for him to remove the muck in addition to his other duties (Record, p. 78).

In view of the incomplete examination that the missed-shot man was ordinarily enabled to make, it was the duty of the machine men to examine the face of the drift or cross-cut for missed-shots before setting up their machine and beginning drilling operations (Record, pp. 75, 76, 79, 95, 103, 104). There is some conflict in the testimony as to the duty of the machine men in this particular (Rec-

ord, pp. 112, 113). That the questions of fact arising from this state of the evidence were not properly submitted to the jury is one of the contentions of the defendant, which will receive attention later.

A missed-shot is ordinarily plain to be seen and can be detected without any trouble (Record, p. 75), but it is possible for the rock to so break that it would conceal a missed-shot "and that is why they come at times to miss discovering them, because they are concealed" (Record, p. 95).

Bearing in mind that missed-shots are ordinarily easy of detection, but that sometimes they are so concealed that they cannot be discovered, and bearing in mind the legal principle that it is the duty of every workman to exercise his faculties for self-protection,

Hightower v. Gray (Tex.), 83 S. W. 254-256;
Olson v. McMullen, 34 Minn. 94; 24 N. W. 318;
Crown v. Orr, 140 N. Y. 450; 35 N. E. 648;
Kenna v. Central Pacific, 101 Cal. 29;
Towne v. United Electric Co., 146 Cal. 770;
Russell Creek Coal Co. v. Wells, 96 Va. 416;
 31 S. E. 614,

I shall now proceed to show that there is no proof in this case of the allegations contained in the second amended complaint that the missed-shot causing the accident complained of could have been discovered and known by the defendant by the use of ordinary care and diligence.

The witness Yokum testified that he examined the face of the cross-cut where the accident occurred after the first blast. His examination was from the top of the cross-cut down to the pile of muck, but he discovered no missed-shot. He did not know when the muck was removed and did not go back after its removal for the purpose of making further examination, because, he says, that was not his business, but the duty of the machine men (Record, pp. 98, 99, 102, 103, 104). The witness further says that he was at that place about half an hour before the accident. That Frank Whitsett was there alone, starting a hole, or lifter. The hole was in 5 or 6 inches, perhaps, and he seemed to be having trouble with it. The witness helped him line up the machine. The witness did not look for missed-shots at that time, but he did not see any in the neighborhood of the place where the drill entered the face of the cross-cut. While there was muck there, it had been cleaned away "the best they could before they set up." He says: "I did not see any indication of a missed-hole in that vicinity" (Record, p. 103). He further states that it was more or less the duty of everyone in the mine to look for missed-shots; and

"Q. I will ask you this—Did or did not every miner employed on those premises have to look out for missed-holes?

A. Why, certainly" (Record, p. 104).

The witness Meyers, who was one of the two shift bosses in charge of the shift in which the

Whitsett brothers worked, testified that he was acquainted with the place where the accident happened, and that he directed the drilling machine to be set up there; that at that time the muck was pretty well cleaned up; that he could see the face tolerably well. That while he did not examine it carefully, he walked up and looked it over and could see no reason why they should not set up there. "I did not discover a missed-shot," he says (Record, p. 94). Again, he testifies: "When I told the Whitsett boys to set up their machine at this place, I did not see a missed-hole in this face, nothing to make me suspicious of anything like that * * * I looked at the face when I set these men up there, and saw nothing" (Record, p. 96). On the night of the accident this witness again visited the place where the Whitsett brothers were working shortly after the shift started (Record, p. 96), and while he does not say that he did not at that time discover a missed-shot, it is only logical to conclude from his testimony that, had he discovered one, he would have stopped the work. He further testified that it is a custom in mining for machine men to look for missed-holes and that they did in this mine. And he says: "That is a thing that is so thoroughly understood among miners, that there is no such thing as duty attached to it and no such thing as instructing them concerning it" (Record, p. 95).

The witness Hall, who was the other shift boss, testified that he saw the place where the accident

happened, probably an hour before its occurrence, but that he did not at that time see a missed-shot in the face of the cross-cut (Record, p. 91).

The witness, Lawrence Whitsett, was at the place of the accident for five minutes after his two brothers had begun work there, but he saw no missed-shot (Record, p. 57). He knew the appearance of missed-shots, and he had previously discovered a number in this mine (Record, p. 52).

And the witness Wall testified to substantially the same facts. His work was within thirty feet of the place of the accident. He says he went to get a drink and coming back stopped to talk with the Whitsett boys and remained there probably five minutes. He noticed that the day shift had drilled about five holes, but he does not say that he saw a missed-shot (Record, pp. 59, 62).

The plaintiff testified that he and his brother reached the place of the accident when they went on shift, probably ten minutes after eight, but that they were obliged to wait for steel drills, and it was ten o'clock before they got the drill working. That when he first went to the place of the accident on that evening he remained probably five minutes, during which time he looked at the holes that had been drilled by the day shift, and saw those that had been previously drilled by his brother and himself. He then went for the drills, returning about ten o'clock, when he took out the old drill and put a new one

in the machine. In order to do this, he was obliged to stoop over and his face came within a foot of the face of the cross-cut and about eighteen inches from the ground, and he could see the face of the wall perfectly (Record, p. 71). He was in close proximity to the unexploded blast but did not see it.

While he states in one part of his testimony, that he did not know the appearance of a missed-shot, his entire evidence does not sustain this denial, as he says that he had assisted in loading dynamite into the holes at various times, and that on top of the dynamite they sometimes placed a little mud; that there was a cap and fuse, the latter sticking out of the hole. He, therefore, knew the appearance of a hole loaded and ready to blast, and he states that a missed-hole is a loaded hole that has not gone off; consequently, he must have known what a missed-shot looked like. Further he says that he knew that missed-shots sometimes occurred, and, finally, on cross-examination, he was asked:

“Q. You have seen a missed-hole, of course?

A. I don't remember whether I did or not.

Q. You don't know whether you ever did or not?

A. No, sir” (Record, pp. 70-72).

While there is a conflict in the testimony as to whether or not it was the duty of plaintiff, a chuck tender, to look for missed-shots, it is certain from his testimony that he did not discover

a missed-shot, or anything to excite his suspicions, at the place of the accident, and it is equally certain that he had a very good opportunity of discovering anything unusual or suspicious about his place of work.

Frank Whitsett remained at the place of the accident from ten minutes past eight until ten o'clock. We do not know how he occupied his time, except that the witness Yokum says that he was at the place about half an hour before the accident; that Frank Whitsett was there alone, starting a hole or lifter. Yokum helped him line up the machine. At that time the muck had been cleaned out (Record, p. 103). Frank was an experienced miner and is presumed to have known about missed-shots and their appearance. If there had been a missed-shot observable, it is certain that Frank would have seen it.

From all the testimony quoted, it is apparent that missed-shots are of two classes: First, those that are readily seen as soon as the muck is cleared away; and, second, those that are so hidden that they cannot be discovered by the exercise of any reasonable degree of care. It is further obvious that the missed-shot in this particular case belonged to the latter class, and that none of these witnesses were able to discover it. It does not appear from the evidence that any precaution, usually taken by miners in such cases, was omitted.

How, then, could the defendant, who must act through its employes, in the exercise of ordinary

care, have discovered a missed-shot that deceived so many?

If it was so hidden as to be undiscoverable by the exercise of ordinary care by those whose duty it was to discover the same, there can be no recovery, because the case is lacking in an essential element. It is, as we have seen, necessary for plaintiff to plead and prove that the defendant knew, or by the exercise of ordinary care could have known, of the unexploded blast causing the accident. This he did plead (Record, pp. 24 and 25), but this he did not prove.

In the case of

Malone v. Hawley, 46 Cal. 414,

the Supreme Court said:

“The liability of the defendants depended upon three facts: First, that the method of attaching the hoisting rope to the cage was defective and unsafe, and the injury was caused to the plaintiff by the defect; second, *that the defendants knew, or ought to have known, of the defect*; and third, that the plaintiff did not know of it, and had not equal means of knowledge.”

And so in the case of

Sterne v. Mariposa etc. Co., 153 Cal. 522,

the Supreme Court, in affirming the case of *Malone v. Hawley*, said:

“It was essential to the existence of negligence on the part of the defendant in the matter, not only that the appliance was in fact not

a safe appliance for the work, but *also that the defendant, or its representative Maguire, knew, or ought in the exercise of reasonable care for the safety of its employes to have known, that the wrenches furnished were not safe and sufficient.*”

See also

Wright v. Pacific Coast Oil Co., 6 Cal. Unrep. 93;

Pacific Co. v. Johnson, 64 Fed. Rep. 958;

Bone v. Ophir etc. Co. (Cal. 1906), 86 Pac. 685;

Brunell v. Southern Pacific, 34 Ore. 256; 56 Pac. 129.

We have now to consider the alleged incompetency of Yokum and what effect the evidence relating thereto has on this branch of the case. There is evidence that Yokum drank “considerable” and that he was seen under the influence of liquor several times while on duty (Record, p. 52). Lawrence Whitsett states that he “saw Yokum drunk at the entrance to the mine. The last time was about two weeks before the accident” (Record, p. 57). The witness Wall testifies that he “saw Yokum under the influence of liquor about a week before the accident” (Record, p. 62), while the plaintiff says that he never saw Yokum intoxicated (Record, p. 72). The shift boss, Hall, states that

he had heard of Yokum drinking in the town of Kennett, ten miles away from the mine, and that on one occasion before the accident he had seen him drinking at the bunkhouse (Record, p. 92). But both Hall and Meyers, the two shift bosses, declare that they had never seen Yokum intoxicated while at work in the mine, and that at no time was there any complaint made about Yokum being incompetent through drinking, or any complaint made at all (Record, pp. 91, 96). Greninger states that he had never seen Yokum intoxicated, nor had any complaint ever been made to him about his being intoxicated (Record, p. 77).

If we concede for the purposes of argument, that Yokum, like many men of his class, sometimes drank to intoxication and that defendant knew, or ought to have known, of the fact, it is still insisted that plaintiff has not made out a case.

There is no evidence that Yokum drank to such an extent that his ability to do his work was impaired, nor is there any evidence that Yokum was intoxicated at the time he inspected the face in question, or at the time of the accident. He himself declares that when he inspected the face, he was sober (Record, p. 112), and this evidence is nowhere contradicted. No witness states that he was intoxicated within a week prior to the accident (Record, pp. 57, 60, 61, 62), and, as we have seen, there is no evidence that Yokum, by the exercise of ordinary care, could have discovered the con-

cealed missed-shot prior to the accident. In other words, there is no evidence that the accident was proximately due to any negligence or failure to exercise ordinary care on the part of Yokum.

Cosgrove v. Pitman, 103 Cal. 273.

It is the evidence that at the time Yokum inspected the face, the missed-shot was covered with muck (Record, p. 98). It was not his duty to remove the muck or examine beneath it (Record, pp. 98, 99). There is no evidence that Yokum omitted any precaution usually taken in such cases. When the muck was removed, it was the duty of Frank Whitsett, in any event, and,—by the testimony of some of the witnesses,—of the plaintiff, to examine the face for missed-shots (Record, pp. 75, 76, 78, 79, 95, 105, 106, 107 and 111).

If it be contended that there was no duty of inspection on the Whitsett brothers, plaintiff's case is not aided. There is no testimony to the effect that it was the duty of Yokum to go back, after the muck had been removed, and make a further inspection, nor is there any evidence that it was his duty, as suggested in the amended complaint, to mark or report to plaintiff's oncoming shift any unexploded charges of powder. But, supposing such was his duty, we have seen that the missed-shot was so concealed that it could not have been discovered by the exercise of ordinary care. Before plaintiff can recover, it is necessary for him to prove: First, that Yokum was incompetent, that

is to say, that he drank intoxicating liquors to such an extent that his ability to do his work was permanently impaired, or that he was intoxicated at the time he inspected the face in question; Second, that defendant knew, or ought to have known, that Yokum had become incompetent by reason of his habit of drinking intoxicating liquors; and Third, that had Yokum been competent, the missed-shot would have been discovered by him in the exercise of ordinary care.

In the absence of this proof plaintiff cannot recover, because the case would be entirely lacking in the element of negligence. If Yokum's ability had not been impaired by the habit of drink,—and there is no evidence that it had, and if he was sober at the time he inspected the face in question,—and the evidence is that he was,—there can be no recovery even though the missed-shot could have been discovered, because, in that case the accident would be due to the negligence of Yokum, a fellow-servant of the plaintiff. The authorities settle the law on the matters under discussion. The case of

Cosgrove v. Pitman, 103 Cal. 273,

is particularly in point. There the death of an employe was caused by the negligence of an engineer, a fellow-servant, who, it was alleged, was addicted to the habit of drinking intoxicating liquors, and that the defendants were negligent in retaining him in their employ by reason of being

chargeable with knowledge of this habit. One witness, when asked about the habits of the engineer

“with respect to drink prior to the day of the accident, said: ‘I have seen him take a drink once in a while. I have seen him when he was pretty full.’ And, when asked how frequently, said: ‘Well, not very often. It might be once a week, or something like that.’”

Other witnesses testified to other specific instances of intoxication, while the engineer himself stated that he was not intoxicated on the day of the accident and had not taken any intoxicating liquors for a year prior thereto. The Court says:

“Unless the accident was in some way connected with such habit, or resulted from intemperance, the habit was not the cause of the negligence, and the defendants could not, by reason of their knowledge of this habit, be rendered liable for the negligence of Murphy resulting from any other cause. If the fact of Murphy’s habit of intemperance at or about the time of the accident had been shown, the jury might have inferred that he was in that condition at the time of the accident, and that his negligence was the result of this condition. Proof of his being under the influence of liquor at the time of the accident would be presumptive of his negligence, and, if it had appeared by direct evidence that he had a habit of intemperance, *it would throw upon the defendants the burden of showing that he was not then in that condition.*”

In the Cosgrove case the engineer testified that he was not intoxicated on the day of the accident, and this testimony was uncontradicted (p. 272). In the case at bar Yokum testified that he was sober

when he examined the face in question, and that testimony is uncontradicted. In both cases, then, the defendant met the burden of proof by positive undisputed testimony.

Gier v. Los Angeles etc. Ry., 108 Cal. 130.

In

Harrington v. N. Y. Cent. R. Co., 19 N. Y. St. Rep. 20; 4 N. Y. Supp. 640,

plaintiff claimed that he was injured through the negligence of a fellow-servant, one Wienkaupf, who, it was alleged, was incompetent by reason of being addicted to the use of intoxicating liquors. The Court said:

“There was no proof that Wienkaupf was incompetent or unfit for his position, unless rendered so by intoxication. We find no evidence to sustain the theory that his habits had in any way disqualified or unfitted him for the proper performance of the duties of his position when he was sober. Therefore, unless Wienkaupf was intoxicated on the morning of the accident, we do not perceive how the fact that he had been intoxicated upon the occasions mentioned in any way contributed to produce the plaintiff’s injury. It is clear that his injury was not occasioned by the intoxication of Wienkaupf at other times. If Wienkaupf was sober on the morning of the accident, it must follow, we think, that the intoxication proved in no way contributed to plaintiff’s injury, and hence, even if defendant was negligent in employing Wienkaupf because of his intemperate habits, still, as such negligence did not contribute to plaintiff’s injury, it was not actionable, and cannot form a basis for the recovery in this action.”

And see

Engelhardt v. Delaware etc. R. Co., 78 Hun.
(N. Y.) 588;

Galveston etc. R. Co. v. Davis, 92 Tex. 372;
48 S. W. 570;

Zumwaldt v. Chicago etc. R. Co., 35 Mo. App.
661-664;

Langworthy v. Green Tp., 88 Mich. 207-217;
50 N. W. 130-133.

There is no evidence that Yokum was intoxicated at the time that he inspected the face, or that he could have discovered the missed-shot. No fact is proven from which the inference of negligence can be justly drawn. The jury were not entitled to infer negligence from a presumption that Yokum was under the influence of liquor when he examined the face, against his positive testimony that he was sober. A presumption must be based on a fact or facts, not on another presumption.

Puckhaber v. So. Pacific Co., 132 Cal. 366;

Cosgrove v. Pitman, 103 Cal. 273.

Plaintiff cannot recover for another reason: The duty that rested upon the defendant to provide a reasonably safe place in which deceased was to do his work, has well defined limitations, and the law relative to that subject, as applicable to the unquestioned facts in the case at bar, is settled by an al-

most unbroken current of authority. The master's duty to maintain a reasonably safe place of work is applied only where the place is permanent or *quasi* permanent, and it does not apply to such places as are constantly shifting or being transformed as a direct result of the employe's labor and where the work in its progress necessarily changes the character of the place for safety from moment to moment.

The case of

Consolidated Coal & Mining Co. v. Floyd, 51
Oh. St. 542; 25 L. R. A. 854,

is quite similar to that at bar. It was an action to recover damages for death. Clay, the deceased, was employed in mining coal and was killed by the falling upon him of a portion of the roof of the compartment in which he was at work. In the progress of the work it was the duty of a man, Dalton, to post and prop the roof of the mine. The Court says in its opinion:

“It is insisted by the defendant in error that the duty of the defendant company in respect to furnishing a safe working place, was such that it was liable for the negligence of Dalton, irrespective of the question of his incompetency, and of the company's knowledge thereof, and the case was given to the jury by the learned judge of the common pleas upon this theory. Necessarily this view of the law proceeds upon the assumption that Clay and Dalton were not fellow servants, but that, as respects the posting and propping, Dalton was the *alter ego*, of the company, and hence the superior of Clay. The claim is sought to be sustained by a class of

cases which hold that the duty of the master to provide a safe working place and machinery for his employes cannot be delegated so as to absolve the master from liability in case of failure of the vice-principal to perform that duty. It does not seem necessary to review these cases. They are, as a rule, based upon the proposition that where the appliance, or place, is one which has been furnished for the work in which the servants are to be engaged, there the duty above stated attaches to the master. We need not discuss this proposition for we have not that case. Here the place was not furnished as in any sense a permanent place of work but was a place in which surrounding conditions were constantly changing, and instead of being a place furnished by the master for the employes within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform."

(A number of cases being cited.)

In the case of

American Bridge Co. v. Seeds, 144 Fed. 605;

11 L. R. A. (N. S.) 1042,

plaintiff was employed in the work of removing an old railroad bridge and in constructing a new one across the Missouri River. In the course of his work he was struck by a piece of iron being hoisted with a fall and tackle, and knocked off the staging erected at the side of the bridge. In reversing a judgment in favor of the plaintiff, the Court, by Judge Sanborn, says:

"And, finally, the positive duty of the master does not extend to making or keeping a place

reasonably safe, where the work is to make a reasonably safe place dangerous or an obviously dangerous place safe, as in blasting rock, tearing down structures, and removing superincumbent masses.”

In the case of

Anderson v. Daly Mining Co., 16 Utah 28;
50 Pac. 819,

in which the plaintiff was injured by the explosion of a missed-shot, we find it stated that:

“While the employer is bound to furnish a safe place for the servant to work in, he is not bound to make it an absolutely safe place; but in a place where the nature of the business is such that the conditions are continually changing by reason of the putting in and setting off of blasts, and of continuing excavations in a shaft, and thereby temporarily dangerous conditions arise, the employer cannot be held responsible therefor. * * * The employer was bound to furnish a reasonably safe place and appliances with which to do the work. But where the nature of the business is extremely dangerous, and conditions are necessarily continually changing by reason of placing and setting off blasts, whereby dangerous conditions arise continually through the acts of the servant, without the knowledge of the master, the employer cannot be held responsible therefor without his fault.”

The foregoing was quoted with approval in

Shaw v. New Year etc. Co., 31 Mont. 138; 77
Pac. 517,

in which case plaintiff was also injured by the explosion of a missed-shot.

See also

- City of Minneapolis v. Lundin*, 58 Fed. 529;
Finlayson v. Utica etc. Co., 67 Fed. 510;
Gulf etc. Co. v. Jackson, 65 Fed. 50;
Florence etc. Co. v. Whipps, 138 Fed. 13;
Moon Anchor etc. Mines v. Hopkins, 111 Fed. 303;
Fournier v. Pike, 128 Fed. 993;
Kreigh v. Westinghouse etc. Co., 152 Fed. 120;
Armour v. Hahn, 111 U. S. 313; 28 L. ed. 440;
Poorman etc. Co. v. Devling, 34 Colo. 37; 81 Pac. 252;
Heald v. Wallace, 109 Tenn. 346; 71 S. W. 84;
Holland v. Durham Coal Co., 131 Ga. 715; 63 S. E. 292;
Rolla v. McAlester Coal Co., 6 Ind. Ter. 410; 98 S. W. 141;
Thompson v. California Construction Co., 148 Cal. 39.

It follows, therefore, that under the facts shown by the evidence in this case, there was no duty on the part of the defendant to furnish the deceased with a reasonably safe place in which to do his work. There being no duty, there could be no breach thereof, and plaintiff has no cause of action upon which to base a judgment.

IV.

AS TO ERRORS NOS. 44 AND 45.

The trial Court was requested to charge the jury relative to the law last considered in the preceding point, but refused to do so, the requested charges being as follows:

“I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses” (Record, p. 172).

And again in a modified form:

“It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers” (Record, p. 173).

The refusal of the Court to charge the jury in accordance therewith, being assigned as Errors Nos.

44 and 45, respectively. And see Error fifty-third (Record, p. 181).

The argument made and cases cited in the last preceding point fully establish the correctness of the law as set forth in these requests and that the law is applicable to the facts shown by the evidence. The refusal to give the same, therefore, was palpable error.

V.

AS TO ERROR NO. XXVI.

For the reasons that have already been discussed, it was error for the trial judge to deny defendant's motion, made at the conclusion of plaintiff's case, to strike out the testimony relative to the incompetency of Yokum. The motion was as follows:

"Defendant moves to strike out all the testimony in this case as to the incompetency of the man Yokum, and all of the testimony in the case as to his being intoxicated or seen intoxicated, on the ground that it is not shown in the case that Yokum was intoxicated on the day of the accident, and that it was not by reason of the intoxication of Yokum that no proper inspection of the face of the drift was had, and that it is not shown that he had at any time on that day inspected the face in question, and that it is not shown that such evidence tended to prove the negligence or the incompetency or the impairment of the ability of Yokum, and that it is not shown that it was by reason of Yokum's drinking habits that he was careless or unfit or ever at any time overlooked a 'missed-hole'."

It is unnecessary to repeat the arguments already made in point III, concerning this error.

VI.

ERRORS XLIX, L AND LI.

The Court charged the jury in this cause as follows:

“In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a ‘missed-hole man’, and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself” (Record, p. 179).

The defendant on its part had requested, but the Court refused, to charge the jury as follows:

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said

Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant" (Record, pp. 177, 178).

Defendant also requested, and the Court refused, to charge the jury as follows, to wit:

"If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant" (Record, pp. 178, 179).

Exception was taken to the giving of the one charge which is assigned as Error No. fifty-one (LI), and to the refusal to give the others, which are assigned respectively as Errors Nos. forty-nine (XLIX) and fifty (L).

Aside from defendant's contention that no duty rested upon it to furnish deceased with a reasonably safe place in which to do his work, it was further

insisted that the employment of Yokum, the missed-shot man, was an extra precaution, and that such employment did not relieve the miners from their duty of looking for missed-holes, because the examination made by Yokum was frequently incomplete, for the reason that he could not look beneath the muck which he could not remove. This position of defendant was amply supported by evidence. Plaintiff on his part, however, contended otherwise, and there is some evidence in support of his theory. Under these circumstances, it was for the jury to determine, under proper instructions from the Court, what were the true facts, and whether or not, in view of the employment of Yokum, there still remained any duty on the part of Frank Whitsett or the plaintiff to look for and discover, if possible, missed-shots while the latter was employed in the defendant's mine.

The testimony relating to the subject is as follows: The witness Yokum stated that he was hired to bar down, and a day or two later the shift boss gave him orders to look out for missed-holes and shoot them when he could, otherwise, to have the machine men shoot them; that he had nothing to do with the muck that accumulated on the floor of the drift or cross-cut after a blast. It was his duty, he stated, to examine as far down as he could, which would be down to the muck; that it was not his duty to remove the muck (Record, pp. 98, 99, and 102); that after the muck was cleared away it was the business of the machine men to examine for missed-holes

(Record, pp. 102 and 103); that every miner employed by the defendant had to look out for missed-holes (Record, p. 103).

The witness Meyers testified that in every place where he had worked it was the custom for machine men to look out for missed-holes, and that they did so in defendant's mine, that some chuck-tenders looked for missed-holes and some did not. He says:

“That is a thing that is so thoroughly understood among miners that there is no such thing as duty attached to it and no such thing as instructing them concerning it” (Record, p. 95).

Greninger, the foreman, says:

“It was the duty of all machine men to look for missed-holes, in order to protect themselves in cases where the missed-hole man was not, for any reason, able to find them, either being limited in time or from being covered with muck.” He says also: “I do not consider that it was the duty of chuck-tenders to blast missed-holes, but it was the duty of each man in the mine to look for and avoid missed holes” (Record, p. 75).

The witness further testified:

“Q. Then, what was the object of having a missed-hole man?

A. It was this: We had in this mine many men employed as muckers, not acquainted with powder and would not know it if they saw it. These bar men and missed-hole men were employed by me for the purpose of protecting those men and also leaving the upper part of the face clean, so that a machine could be set

up when a machine had finished somewhere else.

My idea in employing the missed-hole men was to protect the inexperienced men" (Record, p. 79).

The witness Thomas testified that he never heard of the employment of a missed-hole man, except upon this occasion; that there is a custom among miners to examine for missed-holes (Record, p. 104). Pritchard testified to the same facts, and added that:

"The business of examining for missed-holes devolves on both the machine man and chuck tender" (Record, p. 105).

And so the witness Davis testified that it is the custom for the miners—the two men at the drill—to look for unexploded blasts or missed-shots, and that it is not customary to place that duty upon a missed-shot man (Record, p. 107). And further, that if there is a missed-hole man employed in a mine, the duty would devolve on both him and the miners to look for missed-holes (Record, p. 110). So the witness Gowing says that it is the custom for the drill operator and chuck-tender to investigate or look for missed-shots (Record, p. 111).

On the contrary, Lawrence Whitsett testifies that in big mines he had never heard that it was the custom for the miner and chuck-tender to look out for and discover missed-holes (Record, p. 112). Yet, he says that at different times he discovered and reported missed-shots (Record, p. 52). And Enos Wall testifies in a similar strain (Record, p. 112).

With this conflict in the testimony, it was for the jury to determine the facts as to whether or not the employment of a missed-shot man entirely relieved the miners from their duty to look out for and discover missed-shots, and it was, consequently, error for the trial Judge to charge the jury, as matter of law, that in the event that the defendant provided an inspector, called a missed-hole man, then any driller or chuck-tender, regularly set at work at places inspected by such missed-hole man,

“was entitled to assume that such inspector had done his duty in that regard and to act upon that assumption, and would not be guilty of negligence in failing to make such inspection himself” (see cases cited at the end of point III).

Under the charge as given, the jury were left uninformed as to the law to be applied in the event that they found that the employment of Yokum did not relieve Frank Whitsett and plaintiff from the duty of making an inspection for missed-shots. That the jury could very well have found such to be the facts, is evident from the volume of testimony introduced by the defendant in this connection. Proper instructions of the Court in a case of this character must embrace the subject from every angle. The jury should have been told that the defendant could lawfully place the duty of inspection on the shoulders of both Yokum and the Whitsett brothers. See Record, p. 141, for such an instruction. This was the theory of the defendant, and, there being evidence to support it, defendant

was entitled to have the same submitted to the jury under proper instructions.

People v. Taylor, 36 Cal. 265;

Davis v. Russell, 52 Cal. 615;

Buckley v. Silverberg, 113 Cal. 682;

Walsh et al. v. Tait, 142 Mich. 127; 105 N. W. 544;

Colgrove v. Pickett, 75 Neb. 440; 106 N. W. 453;

Hauber v. Leibold, 76 Neb. 706; 107 N. W. 1044.

If this is a proper subject for instructions under the evidence in the case at bar, the trial Judge could properly have told the jury in effect that if they found from the evidence that the employment of Yokum wholly relieved the plaintiff and also Frank Whitsett from the duty of looking for missed-shots, then and in that event, said plaintiff was entitled to assume that such inspector had done his duty in that regard and to act upon the assumption, and would not be guilty of negligence in failing to make such inspection himself, whereas, if, on the other hand, they found that the employment of Yokum did not relieve the plaintiff from such duty of inspection then any failure or neglect of plaintiff to make such an inspection on his own behalf would amount to such contributory negligence as would defeat his action, and that if no duty of inspection rested on plaintiff, but that such a duty did rest on Frank Whitsett, then, if the accident was proximately caused by his neglect in that behalf, plain-

tiff cannot recover because Frank Whitsett was a fellow-servant of plaintiff.

The error is apparent from another view point. The instruction given was based upon the theory that it was the absolute duty of the defendant to furnish Frank Whitsett with a reasonably safe place in which to do his work. We have seen, however, in point three (III) that this duty of the employer does not apply where the place of work is not permanent or, what may be termed, *quasi* permanent. Where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and where the employe has facilities equal to those of the employer for ascertaining the dangers in the place of work, the employe is under as much obligation as is his employer to be on the lookout for defects or dangers. Consequently, the rule requiring the employer to furnish a reasonably safe place of work is inapplicable. The facts of the case at bar bring it within the exception to the rule. See authorities cited in point three (III).

From the foregoing, we cannot escape the conclusion that it was error to give the charge complained of and error to refuse the charges requested.

VII.

AS TO ERROR No. XLVIII.

The trial Judge refused to charge the jury, at the request of the defendant, as follows:

“If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of detecting missed-shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett” (Record, pp. 140, 141).

This is a correct statement of law, and defendant was entitled to have it given to the jury. The principles contained in this instruction were not given, even in substance, in the charge of the judge.

The evidence shows that Yokum was employed by defendant for the purpose of detecting missed-shots; it also shows that on several occasions he was seen intoxicated. There is, however, no evidence that his use of intoxicants was such as to affect his ability to do his work when sober. The

undisputed evidence is that he was sober at the time that he examined the face where the Whitsett brothers were injured (Record, p. 99). There is no evidence that he omitted any precaution usually taken by miners for the discovery of missed-shots, and there is no evidence that the accident complained of was proximately caused by Yokum's incompetency, or even by Yokum's negligence. On the contrary, as is shown elsewhere in this brief, the evidence is that the missed-shot was so concealed that it could not have been discovered by the exercise of ordinary care on the part of Yokum or any other of the defendant's employes.

The proposed instruction is, therefore, within the facts shown by the evidence and embraces defendant's theory of the case, and it should have been given by the trial judge as a correct exposition of the law applicable to the case.

Cosgrove v. Pitman, 103 Cal. 273;

Gier v. Los Angeles Etc. Ry., 108 Cal. 130;

Harrington v. N. Y. Cent. R. Co., 19 N. Y.

St. Rep. 20; 4 N. Y. Supp. 640;

Engelhardt v. Delaware Etc. R. Co., 78 Hun. (N. Y.) 588;

Galveston Etc. R. Co. v. Davis, 92 Tex. 372; 48 S. W. 570;

Zumwaldt v. Chicago Etc. R. Co., 35 Mo. App. 664;

Langworthy v. Green Tp., 88 Mich. 217; 50 N. W. 133.

The proposed instruction above quoted contained the further paragraph:

“If you should find from the evidence that Yokum was an incompetent employe employed by the defendant to detect missed-shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed-shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed-shot that caused the accident, and, failing in this particular, your verdict must be for the defendant” (Record, p. 141).

The argument made with reference to the preceding point six (VI) is applicable to that portion of the proposed instruction now under consideration. Taken together with those instructions which were refused by the Court and which are set forth as errors forty-nine (XLIX) and fifty (L), this proposed instruction rounds out fully defendant's theory of this branch of the case, and, being supported by evidence, it was error for the trial Judge to refuse the same.

See

People v. Taylor, 36 Cal. 265,
and other cases cited with it in point six (VI).

In an endeavor to protect its workmen, defendant employed Yokum. It was an unusual and extra precaution, one which it was not bound to take. It was an effort to safeguard the welfare of its employes, for which it should be commended, rather than condemned. Having done this, it would be a peculiar justice that could forge a purely humanitarian act into a weapon with which to smite the employer. Such justice could be based solely upon the idealistic theory that having gone a mile, it was defendant's duty to go two, and make plaintiff's work absolutely safe, regardless of his negligence or that of others. Such is not the law and never can be the law so long as actions of this character are governed by the principles of the law of negligence.

For the reasons herein contained, it is respectfully submitted that this Court correct the errors of the District Court by reversing the judgment complained of and directing a new trial herein.

Dated, San Francisco,

October 1, 1914.

C. H. WILSON,

Attorney for Plaintiff in Error.

No. 2419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COP-
PER COMPANY (a corporation),
Plaintiff in Error,

vs.

FRED WHITSETT,
Defendant in Error.

Upon Writ of Error to the United States District Court for the Northern
District of California, Second Division.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM M. CANNON,
Attorney for Defendant in Error.

Filed this day of November, 1914.

Filed

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FRANK D. MONCKTON, Clerk.

By F. D. Monckton, Deputy Clerk.

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BRIEF FOR DEFENDANT IN ERROR.

Preliminary Statement.

In the statement of the case in the brief of plaintiff in error there are certain inaccuracies. Referring to the duties of the "missed-hole" man, Yokum, it is said that it was his duty to examine the face of the drift or cross-cut *as far down as the accumulation of muck at the bottom of the same* would permit. On this subject the evidence is conflicting, plaintiff's evidence showing that it was

Yokum's duty to examine the whole face of the drift (Record, pp. 61, 78, 79, 103).

It is also stated that it was not Yokum's duty to examine below the pile of muck for missed shots. On this subject, as before stated, there was a conflict, plaintiff's evidence being that it was Yokum's duty to examine the entire face of the drift after the muck had been removed (Record, pp. 61, 79, 103).

It is asserted that in the face of the cross-cut, one round of holes had been drilled and blasted, breaking the rock out to a depth of three or three and one-half feet. On this question there is a conflict, plaintiff's evidence being that the round of holes under consideration marked the beginning of the cross-cut (Record, pp. 53, 56, 59, 65, 68).

Statement of the Case.

It will be the purpose of defendant in error to state herein only such facts as are not sufficiently covered in the brief for plaintiff in error.

In the mine where the accident occurred there were about fifty faces where blasting operations were ordinarily carried on (p. 76). It was the practice to drill about a dozen holes and then explode them at the end of a shift (pp. 49, 57, 58, 62, 68). The foreman would direct the machine man and chuck tender where to drill the holes (pp. 49,

52, 58). If a round of holes was not completed in one shift the next shift would take up the work, and so on, until the round was finished (pp. 59, 68).

After the round of holes was exploded it became the duty of the "bar-down" man to bar down the loose rock in the face of the drift which had not already fallen, after which it was the duty of the muckers to remove the loose rock resulting from the blasts (pp. 52, 76, 77).

There was also provided a "missed-hole" man, whose duty it was to examine the face of the drift after the explosion of a round of holes for the purpose of discovering "missed holes", that is, unexploded charges of dynamite (pp. 48, 49, 61, 77, 79). The practice was for the "missed-hole" man to spend as much of his time as was necessary in looking for "missed holes" and to shoot them when found (p. 78). At the time of the accident Yokum was acting both as "bar-down" man and "missed-hole" man (pp. 52, 57, 60, 71).

After the removal of the muck and the examination by the "missed-hole" man, the foreman would, when convenient, set a crew at work drilling another round of holes (p. 53). No crew worked in any definite place steadily (pp. 52, 57, 69). One crew might work on one face for one shift and in another part of the mine the next shift (pp. 57, 69). Where the men worked depended altogether upon the pleasure or discretion of the foreman and shift boss (pp. 49, 52, 58).

At the time the accident happened one Hall was the foreman and one Meyers the shift boss (p. 48). It was their practice to commence their work at opposite ends of the mine, setting the crews at work and gradually coming together near the center of the mine, thus covering the entire ground (p. 94).

On the night in question Fred Whitsett and his brother Frank were set to work completing a round of holes for the cross-cut (pp. 66, 68). During the previous night (their first shift) they had drilled five holes (p. 59). The succeeding crew drilled several more and there were still two or three holes to be drilled when Fred and Frank went on shift again (p. 59). At that time, about two hours before the accident happened, there was a hole already started (p. 66). The foreman, Hall, assisted the boys to set up their machine and directed them to continue drilling the hole which was already begun (pp. 65, 66, 90). After some delay in getting the proper drills they commenced to follow their instructions, and, after drilling several minutes, an explosion of a "missed hole" occurred, resulting in the death of Frank and the serious injury of Fred (pp. 66, 70).

Yokum testified that he had examined this face down to the muck, which lay scattered around on the bottom of the tunnel, but made no examination after all the muck had been removed (p. 103). He was present at the face about the time the boys were

set at work and then had an opportunity to examine the whole face of the drift for "missed holes", but at that time made no examination at all (p. 103).

There was a conflict in the testimony as to whether it was the duty of the machine men and chuck-tenders to look for "missed holes" (pp. 112, 113, 114, 75). Witnesses for plaintiff in error say that it was their duty, but admit that they never gave either Frank or Fred Whitsett instructions to that effect (pp. 77, 80, 81, 112, 113, 114). The evidence for defendant in error is to the effect that the "missed-hole" man was employed for that specific purpose, and that no duty devolved on Fred or Frank to do that for which the "missed-hole" man was employed (pp. 71, 112, 113, 114).

Candles were used by the miners and "missed holes" were much easier of discovery in the upper part of the face than near the bottom of the drift (pp. 59, 79).

When the foreman set the boys at work to complete the hole already commenced he made no inspection of the face of the drift to discover "missed holes" (pp. 92, 93).

It appears, therefore, that no representative of the employer made any careful examination of this particular face for missed holes. Yokum, the "missed-hole" man, made a casual examination of a part of the face before the removal of the muck, but although he was there after all the muck had

been removed he made no further examination. The foreman made no examination at all, but set the boys at work completing a hole already started. This work set off the unexploded blast, causing the injury and death complained of.

It is the contention of defendant in error, leaving out of consideration the question of the competency of Yokum, that there was ample evidence to show that Frank and Fred Whitsett were negligently set to work in a place where death or serious injury was almost certain to result from carrying out the employer's specific instructions.

Argument.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

There was no misconduct of counsel for defendant in error. If the president of the indemnity company which had indemnified plaintiff in error against liability for personal injuries or death had been called as a juror it would have been impossible to disqualify him unless it were shown, (1) that he was such president, and (2) that his company had indemnified the plaintiff in error against loss. In order to elicit these facts appropriate questions would have to be propounded to the juror. The questions complained of were merely for the purpose of eliciting information of that kind. Upon

objection being made by counsel for plaintiff in error the court asked Mr. Cannon, counsel for defendant in error, to state the purpose of the question. This was done solely in compliance with the court's request, and the court allowed the inquiry and at the same time instructed the jury to pay no attention to anything of that kind. There was certainly no error or misconduct here. The matter was a pertinent one to be inquired into and was handled as delicately as possible. It was not claimed at any time that the answers of the juror or statements of counsel were evidence in the case. Jurors are presumed to be men of ordinary intelligence, and it should certainly be assumed that they did not take as evidence what clearly was not evidence.

Considering the nature of the evidence the verdicts in both cases were exceedingly small. The evidence in the Fred Whitsett case would have justified a verdict for three times the amount. The verdict in the Reardon case was much less than is ordinarily given in death cases. The smallness of the verdicts clearly indicate that the jury was not influenced in any way by passion or prejudice. Notwithstanding the fact of the interest of the indemnity company, the plaintiff in error was dealt with most tenderly by the jury.

A further complete answer to the contention is that the plaintiff in error never requested the court to instruct the jury to disregard any statements of counsel on questions asked the jurors. The court

virtually instructed the jury at the time to disregard the statements as evidence and indicated its willingness to give a further instruction later. Counsel had no right to rely upon the court giving this instruction of its own motion. Counsel prepared and proposed a large number of instructions, but studiously omitted to ask an instruction on this subject. Consequently he cannot now be heard to complain.

Hodge v. Chicago etc. R. Co., 121 Fed. 48;

Frizzell v. Omaha St. R. Co., 124 Fed. 176;

Lindsey v. Testa, 200 Fed. 124;

Texas etc. Co. v. Watson, 112 Fed. 402; judg. aff. 190 U. S. 287.

II.

THE FOURTH ASSIGNMENT OF ERROR.

At the opening of the trial counsel for plaintiff in error "moved the court for an order requiring that plaintiff elect between the two causes of action set forth in the complaint". The motion was denied.

The gravamen of the cause of action in these cases is the injury in the one case and the death in the other. Whether the injury or death was caused by one negligent act or omission or by several acts or omissions operating together to produce the result, is immaterial. The mere fact that plaintiff in error may have been guilty of two distinct acts

of negligence does not give rise to two separate and distinct causes of action. There is only one cause of action in such case, namely, the injury in the case of Fred, and the death of Frank in the Reardon case.

Columb v. Webster Mfg. Co., 84 Fed. 592;
Smith v. Missouri Pac. R. Co., 56 Fed. 458;
Cross v. Evans, 86 Fed. 1;
Chobanian v. Washburn Wire Co., (R. I.)
 80 Atl. 394;
Berube v. Horton, (Mass.) 85 N. E. 474;
Columbus v. Anglin, (Ga.) 48 S. E. 318.

If this be true there were no causes of action to separate, and therefore there could be no election. Moreover, the Code of Civil Procedure of this State, which governs in law cases in United States courts in the absence of any rule or established practice to the contrary, provides no authority for a motion requiring a plaintiff to elect. He is entitled to set forth his cause of action from as many different standpoints as he may have theories of his case and may present his evidence upon all of his different theories. Upon instructing the jury, however, the court adopts what it conceives to be the true theory and charges the jury accordingly.

This procedure is obviously in the interest of justice. If counsel, at the opening of a trial, should be arbitrarily required to state the theory upon which his case will be presented and should be bound by that theory, cases would oftentimes be de-

terminated adversely to plaintiff, not upon the merits, but because counsel had adopted an erroneous theory. The only safe way to secure a determination of any case upon the merits is to permit the complaint to be as broad as any possible theory of the case would justify, leaving it to the court, after the introduction of the evidence, to adopt the true theory in its instructions to the jury.

This was the practice followed in these cases. The court declined to require plaintiff to elect, but in its instructions fully protected both parties in all their legal rights and confined the issues within their appropriate legal limits.

III.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

Plaintiff in error urges that its motion for nonsuit should have been granted because of alleged insufficiency of the evidence. There is absolutely nothing in this point.

It is settled beyond possible controversy that an employer is bound to use ordinary care to provide his employee with a safe place to work. Of course certain employments are inherently dangerous, and the law does not require an employer to eliminate all dangers which necessarily attend a particular employment. But the employer is required to make an employment which is necessarily dangerous a

reasonably safe employment so far as that can be accomplished. It seems paradoxical, but is nevertheless true that, from the legal point of view, a place of employment may be *actually* dangerous, but *legally* safe.

It is not contended in these cases that the employer should have eliminated all danger attending mining operations. But it is earnestly urged that the obligation rested upon the employer to use reasonable care to provide its employees with as safe a place to work as conditions would permit.

In these cases the employer had, no doubt in the interest of safety, provided a "missed-hole" man whose duty it was to examine the faces of drifts before crews were set to work to discover and shoot "missed holes". The employees knew of the employment and duties of the "missed-hole" man, and conducted themselves accordingly. The "missed-hole" man made a casual inspection of the face of the particular cross-cut in question and found no "missed hole", although "missed holes" were easily discoverable by any person looking for them. His first inspection was only partial, as the muck had not been entirely removed. Subsequently, and shortly before the accident, and when the Whitsett boys had been set at work drilling the hole which set off the unexploded blast, the "missed-hole" man, Yokum, was present, but made no inspection of the particular cross-cut which he had before left uninspected. The evidence for the plaintiff in error is

itself to the effect that "missed holes" in the bottom of a drift are more difficult to discover than those in the upper part of the face. Yokum's first inspection was only of the upper part of the face, and he therefore left uninspected that part where the "missed holes" were harder to locate. It might be assumed, if any duty rested upon the miners at all, that the "missed holes" easiest of discovery would be left to them. But certainly the "missed-hole" man should be expected to locate the obscure ones, because that was the very purpose of his employment. Therefore, it was a question for the jury to determine whether Yokum's efforts, such as they were, to discover "missed holes" on the particular face in question constituted reasonable care.

It is submitted that he was grossly negligent. The explosion is indubitable proof that the "missed hole" was there. The evidence is uncontradicted that it was comparatively easy of discovery to any one searching for it. Yokum failed to discover it. Whether his inspection was sufficiently thorough or not was, therefore, a question for the jury. The verdict means that his inspection was not that of an ordinarily prudent person, and such a finding will not be disturbed by this court.

The rule contended for by plaintiff in error has no application to these cases. It is true that where a place of employment is constantly changing through the efforts of the employee himself while performing his duties, and where the employee him-

self thus creates a condition of danger, the obligation of an employer to furnish a safe place to work is considerably modified. But this is not such a case. This was not the regular place of employment of the Whitsett boys. They, in common with all other employees in the mine, were set at work at different places at the discretion of the foreman. When they were put to work in a particular drift and required to drill holes in a particular face, the employer was bound to use ordinary care to see that the particular drift or place was safe at that time. If, during the course of their work, the employees themselves made it unsafe the principle contended for might apply.

In this case the employees had absolutely no discretion as to where or how they would work. The very hole which did the damage was already started when they went to work. Hall, the foreman, assisted them in setting up their machine and directed them to continue drilling the hole which was already begun. Therefore, the general rule clearly applied, namely, that the obligation rested upon the employer to make that particular spot reasonably safe when setting men at work there. As they had been working but a few minutes when the explosion occurred, there was no opportunity for them, by changes produced by their own efforts, to make their place of employment unsafe. Under these circumstances it seems clear that the ordinary rule as to the obligation of employers applies, and that

the rule contended for by plaintiff in error has no application.

Rocky Mountain Bell Telephone Co. v. Bassett, (Ninth Circuit) 178 Fed. 768;

Reid Coal Co. v. Nichols, (Tex.) 136 S. W. 847;

Corby v. Missouri & K. Tel. Co., (Mo.) 132 S. W. 712;

Allen v. Bell, (Mont.) 79 Pac. 582.

The obligation resting upon the employer to use reasonable diligence to furnish his employee with a safe place to work is non-delegable. This proposition is so well established that the citation of authorities is unnecessary. Yokum, in carrying out his duties, was the vice-principal or agent of the employer and his negligence was the negligence of the employer.

It may also be remarked that an obligation rested upon the foreman, as the representative of the employer, to provide the employees with a safe place to work; and in the absence of a sufficient inspection by Yokum, the foreman should have inspected and discovered the "missed hole". Hall admits that he set the Whitsett boys at work, but made no careful inspection of the face of the cross-cut. Both of the employer's representatives on the ground, therefore, were negligent, and it is submitted that the jury's finding of negligence should not be disturbed.

IV.

AS TO ALLEGED ERRORS NUMBERED XLIV AND XLV.

Plaintiff in error contends that the court should have instructed the jury as to the rule obtaining where the place of employment is constantly changing owing to the efforts of the employee himself. As already appears, this principle has no application in this case. The face of the cross-cut in question was not made dangerous by the Whitsett boys. If it was made dangerous by other employees who had worked there at some indefinite time previously, the obligation rested upon the employer to make it reasonably safe before setting the Whitsett boys at work there. This the employer failed to do. The accident happened because of this failure, and not through any change in conditions brought about by the progress of the work.

It was clearly proper for the court to refuse to instruct the jury upon a proposition of law which was not under any conception of the facts involved in the case. See, also, in this connection, the cases last above cited.

Furthermore, it is submitted that the instruction as proposed did not contain an accurate statement of the principle contended for by plaintiff in error.

V.**AS TO ALLEGED ERROR NUMBER XXVI.**

There was no reason why the testimony as to the incompetency of Yokum should have been stricken

from the record. It was in issue under the pleadings, and, therefore, the evidence was properly received. The court's only duty in the premises was to give the jury appropriate instructions on the subject of Yokum's incompetency. This was done and the question of Yokum's incompetency was thus left to the jury where it belonged. If the evidence of his incompetency was insufficient to go to the jury plaintiff in error should have requested that the jury be so instructed. A motion to strike out was clearly not the proper remedy.

VI.

ALLEGED ERRORS XLIX, I AND LI.

The evidence of defendant in error as to Yokum's duties as "missed-hole" man was amply sufficient to show that he should have inspected the particular face in question before the Whitsett boys were set at work. This being so, it is well established that the employees had a right to assume that he would perform his duties in that regard. This particular question has frequently been considered in street railroad cases. In *Scott v. San Bernardino Valley Traction Co.*, 152 Cal. 604, where the relative obligations of motormen and drivers of vehicles on the street were under discussion, it was held that while the obligation rested upon the driver of vehicles to use reasonable care for their own safety, they were nevertheless entitled to assume that motormen would

exercise the same degree of care for the safety of the drivers.

This is the precise question here involved. Assuming that any duty rested upon the Whitsett boys to examine the face for "missed holes", a corresponding duty rested upon the employer to do the same thing, and under the doctrine of the Scott case, the Whitsett boys were entitled to assume that the employer's duty in that regard would be performed. The instruction complained of as Error XLIX was, therefore, clearly correct.

The refusal to give instructions assigned as errors L and LI is plainly justifiable. Both instructions ignore the duty of the employer altogether, stating in effect that if the Whitsett boys could not, by the exercise of ordinary care, have discovered the "missed hole", there could be no recovery. These instructions mean that if the plaintiff in error could have discovered the "missed hole", by the exercise of reasonable diligence, it were excused if the Whitsett boys could not have discovered them. There is no necessity for argument as to the impropriety of any such instructions.

VII.

AS TO ALLEGED ERROR NUMBER XLVIII.

The instruction considered was refused, not only because it is inaccurate in many respects, but be-

cause the court very fully and correctly instructed the jury on the subject of Yokum's incompetency, and explicitly stated the rules applicable thereto (Record, pp. 119, 120, 121).

Furthermore, if there should be error in refusing this particular instruction it could not have operated to the prejudice of plaintiff in error. The evidence was amply sufficient to establish the negligence of plaintiff in error without reference to any incompetency on Yokum's part. Were he ever so sober he would still have been negligent in failing to perform the duty of inspection imposed upon him. As the evidence was sufficient to establish the employer's liability without reference to Yokum's incompetency, this question becomes practically a moot or abstract one in the case.

The next instruction discussed (Brief, p. 68) is incorrect. It sets forth, in substance, that if Yokum had examined the face of the cross-cut and had failed to discover the missed hole, and the Whitsett boys had also failed to discover it, they could not recover. This instruction leaves out the question of *ordinary care*. It is further objectionable because it states, bluntly, that if the Whitsett boys failed to discover the missed shot there could be no recovery. This means that no matter how careful their inspection might have been, or how insufficient and casual Yokum's might have been, the boys must lose. This is not the law. Assuming that a like duty rested

both upon the employer and employee, it is the law that if the employer did not use ordinary care to discover the missed hole and the employee did not, then *if the employee's failure in that regard proximately contributed to his injury* he cannot recover. This, manifestly, is a very different statement from that contained in the rejected instruction. In addition to being erroneous in the particulars mentioned, it entirely omits the question of proximate connection between the negligence of employees and the injuries and death complained of.

In conclusion, it is urged that the evidence shows without substantial conflict that Fred Whitsett sustained serious injuries and Frank Whitsett met his death through gross negligence on the part of plaintiff in error. In view of the evidence adduced both verdicts are exceedingly small. The court very fully, carefully and correctly instructed the jury upon every possible feature of the case. A new trial would probably result more advantageously to the defendant in error than to the plaintiff in error, because upon such trial the strong probabilities are that the verdicts would be much larger. It would seem, therefore, that plaintiff in error might let well enough alone. However, although the verdicts are small and plaintiff in error appears to be contending against its own ultimate interest, the defendant in error, in order that this litigation may be brought to an end, urges the affirmance of the

judgment appealed from even though dissatisfied with it.

Dated, San Francisco,
November 5, 1914.

Respectfully submitted,

WILLIAM M. CANNON,
Attorney for Defendant in Error.

No. 2419

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER COMPANY
(a corporation),

Plaintiff in Error,

VS.

FRED WHITSETT,

Defendant in Error.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

C. H. WILSON,

Attorney for Plaintiff in Error.

Filed

Filed this _____ day of December, 1914.

DEC 11 1914

F. D. Monckton, FRANK D. MONCKTON, Clerk

Clerk.

By _____ Deputy Clerk.

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Herein an attempt will be made to answer only that portion of the brief of defendant in error that seems material to the issues involved in this case.

There is some difference between Mr. Cannon and myself as to the proper interpretation to be given to the evidence in certain particulars. It would seem, however, that the case must be determined on questions of law, which are not affected by this divergence of opinion. I shall, therefore, proceed to a consideration of those legal questions.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

Counsel claims that there was no misconduct on his part in bluntly telling the jury that there is indemnity insurance against the accident complained of and that the indemnifying company is making a defense through its own counsel. He cites no case as authority for his contention, but relies upon a bare supposition that the juror under examination might have been the president of the indemnifying company. The answer is that he was not. We have no such case. Until such a case is reached, it is not necessary to decide it. All of the authorities cited in the opening brief sustain the proposition that it is improper for plaintiff's counsel in cases of this character to inform the jury *in any manner* of the existence of accident insurance.

Granting, however, for the purposes of argument, that the talesman under examination was the president of an indemnifying company, we find that the

Code of Civil Procedure, Sec. 602, Subd. 3, provides that a challenge for cause may be taken where the talesman is a surety on any bond or obligation for either party. This being true, it was only necessary for counsel to show those facts, and he could have done so without violating the obvious right of the defendant to a fair trial. By appropriate examination he could have shown that the talesman was the president of a corporation and that that corporation was a surety on a bond or obligation for

defendant. He then would have been entitled to his challenge without specifying the nature of the bond or obligation. So, likewise, with perfect propriety, he could have stated to the trial Judge that the reason for his question was to ascertain whether or not the talesman, or any corporation with which he was connected, was a surety on any bond or obligation for the defendant. He would then have answered the question of the Judge properly and would not have bluntly stated to all the jurors a fact most detrimental to the interests of defendant.

The Court did not then and there instruct the jury to disregard the statement of counsel. What the Judge really said was: “*I will develop* what the fact is. * * * I will instruct the jury to pay no attention to the remark of counsel, *unless it should appear it is a pertinent fact.*” This cannot be construed into a present instruction. The Judge distinctly says that he will “develop” the matter, and if it should prove not to be pertinent, *then* he will instruct the jury to pay no attention to it. In other words, the Court promised to deal with the matter and took the burden upon his own shoulders. And by overruling the objection made by appellant’s counsel and failing in its promise, the Court laid its approval on the statement of counsel that there is indemnity insurance against this accident and that the insurance company is defending this case, so that it went to the jury with all the force and effect of evidence.

But counsel states that a complete answer to the contention of plaintiff in error is that it did not request the Court to instruct the jury to disregard the prejudicial matter. There was no such duty on the part of the plaintiff in error. The trial Judge took the whole matter into his own hands when he stated that he would find out what the facts were and then instruct the jury. Under these circumstances, the plaintiff in error had a right to rely upon the promise of the Court and it was under no duty to propose an instruction in this connection. Besides this, many of the authorities cited in the opening brief are to the full effect that such misconduct as is here complained of cannot be cured by even an immediate instruction to the jury to disregard the occurrence. The cases cited by counsel on page eight of his brief go no further than to hold that it is the duty of any party desiring a specific instruction to propose the same to the Court. That has always been the rule, but where the Court takes a matter from counsel and promises to properly instruct the jury in connection therewith, then counsel has a right to rely on the promise and good faith of the Court.

Again, counsel says that the smallness of the verdicts in these two cases indicates that his misconduct worked no prejudice. I do not see how that follows, because it may be that but for the misconduct complained of, both verdicts would have been for defendant below.

II.

THE FOURTH ASSIGNMENT OF ERROR.

It is a curious idea of counsel that the gravamen of the cause of action in these cases is the injury in the one case and the death in the other. It requires no argument to establish that there may be a personal injury or death without any cause of action, and, consequently, the gravamen of the cause of action in these cases is the breach of the particular duty proximately causing the accident and injury, and, in the case before us, those breaches of duty on the employer's part are alleged to be the failure to afford plaintiff below a reasonably safe place in which to perform his work, and a failure to use due care in the selection of a fit and competent fellow-employee. There being two distinct breaches of duty, each of which gives the injured employee a cause of action, they may be set forth in one complaint,

Code of Civil Procedure, Sec. 427,

but they must be separately stated,

Code of Civil Procedure, Sec. 430, Subd. 5.

In this way the injured party may make his complaint "as broad as any possible theory of the case would justify", and when so stated he cannot be compelled to make an election.

Wilson v. Smith, 61 Cal. 210;

Rucker v. Hall, 105 Cal. 427;

Estrella Vineyard Co. v. Butler, 125 Cal. 234;

Remy v. Olds, 4 Cal. Unrep. 242;

Van Lue v. Wahrlich-Cornett Co., 12 Cal. App. 751.

In the case at bar counsel did not follow this obvious rule of pleading, but, on the contrary, stated his two causes of action in one count. Having elected to do this, the remedy of the plaintiff in error was a motion to compel an election, as is distinctly shown in the opening brief.

But, counsel complains that his client might lose his case through a wrong election. It seems absurd that counsel, with his great experience, can be in court and not know on what basis he is asking relief. If he does not know what ground of complaint he has against the defendant below, judgment ought promptly to be entered against him. The defendant should not be compelled to pay counsel fees and the expenses of litigation in order that counsel may experiment on a cause of action.

Bearing in mind that the error complained of in this point is the refusal of the trial Court, on motion, to compel the plaintiff to elect which of two causes of action stated in one count of his complaint he will proceed on, then the cases cited by counsel on page nine of his brief, beginning with

Colomb v. Webster Mfg. Co., 84 Fed. 592, are not at all in point. Indeed, the Colomb case seems to have been cited by mistake, as it deals solely with the question of *res adjudicata*. In the other cases, the complaint before the Court contained more than one count, and to that extent

agreed with the proposition above announced that the pleader may state his cause of action in different forms, provided, he uses separate counts. In none of those cases is the question of an election involved. The utmost that can be said of them, so far as the case at bar is concerned, is that they tend to refute the proposition maintained at page thirty-two of the opening brief, which is, that after the running of the statute of limitations, an amended complaint cannot be filed setting forth new counts containing additional grounds of negligence in cases of this character. But, so far as that is concerned, it is insisted that the California cases cited in the opening brief must control in this case. And see

In re Wilson, 117 Cal. 267,

where it is held that upon a contest of a will, instituted after its admission to probate, the grounds of the contest cannot be amended, after the lapse of the year limited for the institution of the contest, so as to add fraud as a new ground of contest or new cause of action. Still, if these California cases do not control this particular question, even then, those cited by counsel do not affect the actual error, of which complaint is made.

But, counsel makes the further point that there is no provision or authority in our Code of Civil Procedure for a motion requiring a plaintiff to elect, in cases of this character. The authority is found in Section 1003. And see

McGuire v. Drew, 83 Cal. 232;

People v. Ah Sam, 41 Cal. 650.

And see also the California cases above cited, beginning with

Wilson v. Smith, 61 Cal. 210,

where the identical motion under consideration was recognized as the proper mode of obtaining the desired relief.

III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

This point does not go only to the failure of the trial Judge to grant the motion of plaintiff in error for a nonsuit, but it goes to those other points stated in the opening brief:—to the error of the trial Judge in refusing to instruct the jury to return a verdict for the defendant below, and to its ruling on the petition for a new trial.

There can be no controversy relative to the duty of the employer to furnish his employe with a reasonably safe place to work where that place is permanent and prepared by the employer for the employe. I do not, however, understand exactly what the paradox of counsel has to do with the case. He says that “from the legal point of view, a place of employment may be *actually* dangerous, but *legally* safe.” This is evidently a wise remark. Yet, we need no paradox to tell us that all places are surrounded by dangers of one character or another. Probably, he intends to say that under persuasion of counsel, there may be a liability found by the jury

in cases of this character where there is none in point of law.

As I understand the matter, counsel admits that there is no evidence connecting the alleged incompetency of Yokum with the accident, and that he has wholly failed to bring his case within the rule that would hold plaintiff in error responsible for the accident by reason of the employment of Yokum, an incompetent fellow-employee of plaintiff.

If this be true, this branch of the case, then, is reduced to two questions, an affirmative answer as to either of which is fatal to the case of the defendant in error. These questions are: First, does the evidence show that the missed-shot that caused the accident and injury was so concealed that it could not have been discovered by the defendant or its employes in the exercise of ordinary care? And, Second, in view of the nature of the work in which the defendant in error was engaged, does the rule requiring the employer to furnish his employe with a reasonably safe place in which to perform his work apply?

Considering these propositions in their order, it will be remembered that it is "possible for the rock to so break that it would conceal a missed-shot" (Record, p. 95). Ordinarily, there is a mound or bunch of material unbroken by the blast, which is seen at once to be a missed-hole (Record, p. 95). A missed-hole among the "lifters" is more difficult to discover than where it occurs in the upper part of the

face. The lifters are commenced a little above the level and extend quite a distance below, in order to get the bottom of the drift on a level (Record, p. 75). The holes are drilled to a depth of four or five feet (Record, p. 48), and the blast breaks out the ground to a depth of three to three and one-half feet (Record, p. 74). The new face created by the blast would, consequently, be three or three and one-half feet deeper into the rock than the old face, at which the drilling was done. It is obvious that if the entire lifter missed fire, there would be a mound or bunch of material unbroken by the blast and on the floor of the cross-cut, extending a distance of three or three and one-half feet from the new face of the cross-cut. This would be readily detected, and, of course, no such condition existed at the place of the accident. Whatever unexploded blast there was, was hidden behind the new face. This condition could be brought about in the following manner: If, before the blast, the fuses were not exactly timed, an adjoining lifter might first explode and break the rock directly across, and so disjoin the missed-shot. The outer part of this disjoined shot might explode, or it might not, but, in any event, the bottom of the blast, consisting of a hole about an inch in diameter and of a depth of a foot or a foot and a half, would remain charged with unexploded dynamite. This would be below the bottom of the cross-cut and behind the new face and so concealed that it might be impossible of detection, and yet, it would

have sufficient force on explosion to do all the damage here complained of.

The evidence in the case at bar shows that some such condition existed and caused the accident complained of. Plaintiff, his brother Frank, Yokum, Meyers, Hall, Lawrence Whitsett and Wall, all of them able to discover missed-shots, looked this face over and failed to discover the one causing the accident. To be sure, Yokum says that he did not *inspect* the bottom of this particular face after the muck was cleared away. He said that that was not his business (Record, p. 102). But, further, he says that half an hour before the accident he was there and helped Frank Whitsett line up the drill. That the muck had been cleaned out. That he looked at the face where the drill entered the face of the cross-cut, but did not see a missed-hole (Record, p. 103). The missed-hole must have been within a few inches of that which was being drilled. An inspection can be no more than an examination by sight and touch. This is exactly what Yokum did. He looked at and touched the face of this cross-cut at the point where the missed-shot lay concealed, yet, he did not discover it. No one can contend that it was the duty of the plaintiff in error to tear its mine to pieces for the purpose of discovering missed-shots and so provide an absolutely safe place for its workmen to labor. Its utmost duty, as has been pointed out, was to use ordinary care, and, under the evidence, ordinary care was used. It makes no difference whether Yokum "inspected" this face in the regular

course of his duties, or whether he inspected the same incidentally in connection with lining up the drilling machine. All of the evidence is to the effect that this particular missed-shot was so concealed that it could not have been discovered by the exercise of any reasonable degree of care. On this branch of the case, before defendant in error can recover, he must show: First, that there was a missed-shot. Second, that that missed-shot could have been discovered by a reasonable or ordinary inspection. And, Third, that plaintiff in error failed to make such an inspection. The second and third elements are not proven in this case.

Inasmuch as the employment of Yokum as a missed-shot detective was an unusual and extra precaution taken by the plaintiff in error to protect its men, I insist that the miners were not relieved of their duty to examine for missed-shots. If they were relieved at all, they were only relieved to the extent of the duty of Yokum in that connection. The miners were bound to know just how far the employment of Yokum relieved them from their duty of examining for missed-shots. Greninger, foreman of the mine, says, in his cross-examination, to Mr. Cannon:

“There was a missed-hole man for each shift.
 * * * The best time to examine the face was after the muck had been removed, but the exigencies of mining sometimes required the missed-hole man to examine the face before all the muck had been removed. If the missed-hole man found a face clear in the course of his day’s

work, and it was his part of the mine to look after, he examined the face for the missed-holes. If it happened that the face had muck in it, he would examine as far down as possible at that time and go on to the next place. * * * That would leave the bottom of it unexamined. As to whether or not the missed-hole man would go back after the muck was removed to further examine the same face would depend on whether he was ordered to do so or had time to cover those grounds. If he did not have time, it was the duty of the machine men to make the examination. The machine men were supposed to take that precaution for their own protection. It was his duty to examine the whole face every time he went to work" (Record, pp. 78, 79).

Regardless of their testimony in this connection, the miners were bound by these facts relative to the employment of Yokum, and, if they were in any measure relieved from the duty of making an examination for missed-shots, it was only to the extent here indicated. And if, with all of the precautions taken by the company for the protection of its miners, this particular missed-hole escaped detection, that fact in itself is not evidence of negligence, nor could the jury, from that fact alone, guess that the company was negligent in failing to discover the missed-shot in question. The burden of proof is on the plaintiff below, and the evidence must be such that the jury can draw from it a reasonable inference that the plaintiff in error was guilty of negligence, before a case is made out. There being no such evidence in this case, it is insisted that there is a failure of proof.

Considering now the other proposition, that in view of the nature of the employment, the rule requiring the employer to furnish his employe with a reasonably safe place in which to perform his work, has no application to this case, we find that counsel admits the exception to the rule, but he asserts that this is not such case, because the employes did not have that freedom which would permit them to select the place of work; that the foreman directed them in what particular drift or cross-cut or at what particular face they were to do their drilling, and further, that they did not personally bring about the condition of danger that resulted in the accident and injury complained of.

The cases cited in the opening brief make no such exception to the application of the rule. Where the injured employe and his fellow-employes are engaged in a place of work in which the surrounding conditions are constantly changing whereby temporarily dangerous conditions arise, the employer is not bound to furnish a reasonably safe place of work. It makes no difference whether the injured employe himself brought about the dangerous conditions, or whether it was done by his fellow-employes. In the case at bar Yokum is admitted in the amended complaint to be a fellow-employe of defendant in error. Frank Whitsett was declared to be such by the trial Judge (Record, p. 124), and, undoubtedly, all of the other machine men and their helpers, and the miners and muckers, were fellow-employes of Fred Whitsett.

Under these circumstances, it is immaterial where the Whitsett brothers worked in the mine, or whether they were able to choose their place of work. The real question is the *nature* of the employment, not who brought about the dangerous condition, or who directed the workmen. This is obvious from an examination of the facts of the various cases cited at pages 52 to 55 of the opening brief.

In

Consolidated Coal & Mining Co. v. Floyd, 51

Oh. St. 542; 25 L. R. A. 854,

Clay, the deceased, was employed at the time of his death in working a machine used in mining coal. With him at the time was a helper, Devault, who met his death by the same accident. The mine embraced a number of rooms in which cutting with the machine was done. The operation of the machine was to punch or jab the coal and so make a bearing in and under the coal for the driller, who followed and drilled holes in the face of the coal. The driller was succeeded by the filler and poster. Three sets of men were thus engaged in the room at different times and at distinct employments. One Dalton was the filler and poster. He was required to shoot down the coal, fill it into cars, prop the roof where necessary and get the room ready for Clay's machine. The machine required about two and one-half hours in each room and ten rooms were usually assigned to one machine. Clay and Devault were killed by the falling upon them of a piece of slate from the roof of the room in which they were working.

Here we have a case in which the employes did not select their place of work and in which they were moved about from room to room, as the Whitsett brothers were moved about from face to face in the mine of plaintiff in error, and in which the negligence, if any, was that of Dalton, a fellow-servant. Under these facts, the exception to the rule requiring the employer to furnish a reasonably safe place for his employes to labor, was held to apply.

In

American Bridge Co. v. Seeds, 144 Fed. 605;
11 L. R. A. (N. S.) 1042,

plaintiff below was a bridge builder and in doing the work of removing an old railroad bridge and constructing the new one, he was a member of a gang that removed the materials of the old bridge. There were several gangs in charge of several foremen, respectively, each gang having its particular work, and the parts of the work which these gangs should do were assigned to their foreman by a general superintendent. It seems that the plaintiff below was taken from his work of removing the materials of the old bridge and told to adjust a chain and tackle fall around the piece of iron that was to be hoisted, and which piece of iron on being lifted, knocked him off of the staging erected alongside of the bridge. The work was done in the presence and under the directions of the foreman. One of the contentions made on behalf of Seeds was that the bridge company should have entirely floored the staging upon which he stood in adjusting the chain

and tackle fall. As we have seen in the opening brief, under this state of facts, the bridge company was held not liable.

The facts in the case of

Anderson v. Daly Mining Co., 16 Utah 28;
50 Pac. 819,

are as follows: Plaintiff worked in defendant's mine, which employed three shifts. Blasting was being done in the bottom of the shaft, and the reports counted as each blast took place to ascertain if there were any missed-shots. The men were in charge of pushers and all were under one general foreman. The shift preceding plaintiff's went off work, leaving an unexploded shot, the explosion of which caused the injury to plaintiff. Here the missed-shot was caused by the fellow-employees of plaintiff. Plaintiff had absolutely no discretion as to where or how he would work.

In

Armour v. Hahn, 111 U. S. 313; 28 L. Ed. 440, Hahn was engaged as a carpenter in the erection of a new building. Bricklayers and other laborers were also at work upon it. Hahn, who had been working on one end of the roof, went to the other end and was there set to work by the foreman upon the cornice. This was made by inserting in the brick wall of the building at intervals of eight or nine feet and at right angles to it sticks of timber projecting about sixteen inches from the wall.

The defendant in error was instructed to place a joist sixteen or eighteen feet long and two and one-half inches wide on the outer ends of the projecting timbers. In order to do this work, plaintiff got out upon one of the projecting timbers, which tipped over, causing him to fall and suffer the injuries complained of. He had nothing to do with placing the timber that caused the accident. The Supreme Court said on these facts that:

“The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows.”

Here the case turned on the nature of the work, not on how it was done.

In

Thompson v. California Construction Co., 148
Cal. 38,

plaintiff appears to have been a common laborer. Defendant was working a rock quarry and blasting rock. The large irregular pieces of rock so obtained were loaded upon cars. It was plaintiff's duty to assist in the loading operation by attaching chains around the pieces of rock, and when not so engaged, he shoveled dirt. While chaining a rock, another one slipped down the face of the cliff upon him and injured him. A new trial was granted by the Court

below on the ground that the trial Court had erred in instructing the jury that it was the duty of the employer to furnish the employe with a reasonably safe place in which to work, etc., and on the appeal it was further contended that the trial Court had erred in denying defendant's motion for a nonsuit, and the order granting the motion for a new trial was affirmed. The rule contended for by plaintiff in error was held to apply.

Without further consideration of the cases cited in the opening brief, the foregoing are sufficient to establish that the position of counsel is not well taken. Neither are his authorities applicable.

The case of

Rocky Mountain Bell Telephone Co. v. Bassett, 178 Fed. 768,

is a case where the employer knew of the defect that caused the accident and injury, and the employe did not know of it. Besides, the Court, in passing on the case, distinctly recognizes the rule for which I contend (see p. 770).

The case of

Corby v. Missouri & K. Tel. Co. (Mo.), 132 S. W. 712,

is entirely different from that at bar. There, plaintiff was a lineman in the employ of a telephone company, and was injured by a fall caused by the breaking of a wooden pole upon which he was working. The negligence charged in the complaint is that defendant negligently ordered plaintiff to go upon

said pole when it knew, or by the exercise of ordinary care should have known, that said pole was rotten, weak and defective. It was insisted that the rule here contended for by the plaintiff in error was applicable. The Court, however, and properly, said that it was not.

There are many cases growing out of injuries to telegraph and telephone linemen resulting from the falling of poles, and they all turn on a different principle of law from that under consideration.

The case of

Reid Coal Co. v. Nichols, (Tex.) 136 S. W.
847,

was one with which the Court seemed to have great difficulty, but it finally expressly followed the Corby case.

Allen v. Bell, (Mont.) 79 Pac. 582,

is altogether different. In that case there was an express assurance by the foreman to the workmen that the blast, by which plaintiff was injured, had been exploded before plaintiff went into the mine. The rule under consideration is expressly recognized, the Court saying:

“But this rule does not justify a master in neglecting to give information known to him, etc. * * * Much less does it justify him in giving false information regarding any danger.”

I again assert that under the facts of the case at bar, the duty of the employer to furnish his employe with a safe place in which to work was one that

could be delegated; that under the pleadings, Yokum was a fellow-servant of the Whitsett brothers; and that plaintiff in error is not liable for any negligence on its part in the matter of making inspection for missed-shots. The evidence does not show that any duty rested upon the foreman to make inspections or to furnish the various employes of the mining company with a safe place in which to work. But if, for the purposes of the argument, we concede that such duty did rest on the foreman, then he, too, was a fellow-servant of the Whitsett brothers.

Poorman Silver Mines Co. v. Devling, 34 Colo. 37; 81 Pac. 252; 18 Am. Neg. Rep. 308.

IV.

AS TO ERRORS NUMBERED XLIV AND XLV.

The only answer that counsel makes to this point is a contention that the principle of law involved in the requests refused by the Court has no application to this case. Of course, that must necessarily be his contention. That is the only answer that he can make, but, in view of what has gone before, it is to be seen that the legal principle involved is applicable to this case, and that the requests should have been given to the jury.

The question of time is immaterial. If the Whitsett boys or their fellow-servants, in the progress of

their work as miners, at any time rendered this place dangerous, then the rule is applicable, and there was no duty on the part of plaintiff in error to follow in the footsteps of its employes and discover at all hazards every unexploded charge of dynamite that might be in the mine.

V.

AS TO ERROR NUMBERED XXVI.

As stated in the opening brief, at the conclusion of the case of plaintiff in the Court below, a motion was made to strike out all of the testimony relative to the incompetency of Yokum. As has been seen, no sufficient proof of such incompetency was before the Court. In other words, counsel had failed in his proof in this particular, and it was, therefore, a proper motion and should have been granted. It was not a question to go before the jury. The burden of proof being on the plaintiff below, the question of incompetency could not be left to the jury, unless there was proper and sufficient evidence establishing such incompetency. There was no such evidence, and it did not lie with the jury to guess that Yokum was incompetent. Counsel, however, says that it was the duty of the plaintiff in error to request appropriate instructions on the subject. Such an instruction was proposed (see Error 48, p. 65, Opening Brief) and refused.

VI.

AS TO ERRORS NUMBERED XLIX, L AND LI.

Counsel does not answer the contentions of plaintiff in error on this point. All that he advances may be admitted and still the argument in the opening brief is unanswered. Under the testimony set forth on pages 61 and 62 of the opening brief, it was for the jury to determine whether or not the employment of a missed-shot man entirely relieved the Whitsett brothers from their duty to look out for and discover missed-shots. It was, therefore, error for the trial Judge to instruct the jury that if the plaintiff in error provided a missed-hole man, whose duty it was to detect missed-shots, then the Whitsett brothers had the right to rely on his inspection and assume that he had done his duty in that regard "*and would not be guilty of negligence for failing to make such inspection*" themselves. It was clearly the contention of plaintiff in error, well supported by evidence, that it was the duty of the Whitsett brothers to make such inspection, and, there being a conflict in the evidence upon that point, the question of fact was one for the jury and should have been submitted to them under appropriate instructions. It did not lie with the trial Judge to determine, as matter of law, that the failure of the Whitsett brothers to make such an inspection would not constitute contributory negligence.

The interpretation given by counsel of the instructions embraced in Errors L and LI is certainly extraordinary. Undoubtedly it must be admitted

that Frank Whitsett, at least,—and he was the fellow-servant of Fred Whitsett in this case,—could make as thorough and satisfactory inspection for missed-shots as Yokum. If, therefore, he could not discover the missed-shot in question because of its being concealed, then, as the charges under consideration say, the defendant below is not liable, because the defect was so concealed as to defy detection and deceive human judgment.

I cannot understand what the case of

Scott v. San Bernardino Valley Traction Co.,
152 Cal. 604,

has to do with this case. That case arose out of a collision between a street car and a buggy. It has nothing to do with the law of master and servant, nor can it determine the measure of duty owed by an employer to his employe.

VII.

AS TO ERROR NUMBERED XLVIII.

Answering this point, counsel contends: First, that the instruction is inaccurate in many respects. Second, that the Court fully and correctly instructed the jury on the question of Yokum's incompetency. And, finally, conceding the error, he says that it was without prejudice.

As to his first answer, he neglects to set forth wherein the proposed instruction is inaccurate. It

would seem, therefore that we may disregard this answer.

As to the second, however fully the jury may have been instructed, they were not told that before they could find their verdict on the theory that Yokum was an incompetent fellow-servant, they must find that he "was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made the inspection of the face of the cross-cut where the accident occurred". This is the law and plaintiff in error was entitled to have it given to the jury.

Finally, as to the third answer of counsel that the plaintiff in error was not injured by the refusal of the trial Court to give the instruction under consideration, for the reason that the evidence is sufficient to establish negligence without reference to any incompetency on Yokum's part, it is to be said that this is exactly what the evidence does not establish. No matter how the evidence be read, we cannot escape the conclusion that the missed-shot in this particular case was so concealed that it could not be discovered by the exercise of ordinary care. It was a hidden danger.

There is, therefore, no evidence in this case establishing that Yokum was an incompetent workman or that his incompetency proximately caused the accident and injury complained of, or that defendant below was guilty of any negligence proximately caus-

ing the accident and injury to plaintiff in failing to discover the missed-shot.

As to the second paragraph of this proposed instruction, which is quoted at length on page 68 of the opening brief, counsel says that it leaves out of consideration the questions of ordinary care and proximate cause. This instruction is according to defendant's theory of this branch of the case and is amply supported by the evidence. The questions of ordinary care and proximate cause are dealt with elsewhere in the charge. Numerous witnesses testified that it was the duty of the Whitsett brothers to examine for missed-shots. If this was their duty and they failed to perform it, or performed it in a careless manner, then no recovery can be had, because of their contributory negligence. If, on the other hand, they did perform their duty in this particular carefully, but failed to discover the missed-shot, then no recovery can be had, because the missed-shot was so concealed that it was a hidden danger, which could not have been discovered by the exercise of ordinary care.

Concluding his brief, counsel says, as I read his words, that the judgment in this case should be affirmed because the verdict is exceedingly small. Possibly to him the sum of five thousand dollars is of little consequence, but however that may be, the justice of the case can hardly be determined by

the size of the verdict. Justice cannot be measured by the freedom, or lack of freedom, with which a jury undertakes to do charity with the money of a corporation. On the argument, counsel suggested that this was not a proper interpretation of his closing remarks, but that we should rather construe them as expressions of concern on his part over the mistaken and misguided judgment of plaintiff in error in taking this appeal "against its own ultimate interest". If this be the true interpretation to be placed on the language of counsel, the plaintiff in error certainly appreciates his disinterested advice, yet, it cannot but ask why it should be required to pay an unjust,—an unlawful—verdict.

For these reasons, it is insisted that the points made in the opening brief in this case are controlling, and that this Court should correct the errors of the District Court by reversing the judgment here complained of.

Dated, San Francisco,
December 9, 1914.

C. H. WILSON,
Attorney for Plaintiff in Error.

United States
Circuit Court of Appeals
For the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,
Plaintiff in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court
of the Northern District of California,
Second Division.

FILED
JUL 1 - 1914

United States
Circuit Court of Appeals
For the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,
Plaintiff in Error,

vs.

J. E. REARDON, Administrator of the Estate of
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of the Northern District of California,
Second Division.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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was engaged in tunneling, working and operating that certain mine commonly known as and [1*] called the "Balaklala Mine," near Coram, California.

V.

That prior to said 9th day of March, 1909, the aforesaid Frank Whitsett, then aged twenty-one (21) years, or thereabouts, was employed by the said defendant, Balaklala Consolidated Copper Company, as a miner, driller and laborer, to work in said defendant's mine, and that said Frank Whitsett was on said 9th day of March, 1909, in pursuance of said contract of employment, and at No. 400 level, and as such miner, driller and laborer, engaged in the work of operating a drill in a tunnel in said mine for said defendant corporation.

VI.

That the said defendant, Balaklala Consolidated Copper Company, failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for the said Frank Whitsett to perform his said labor as aforesaid, and particularly in this:

That on the 9th day of March, 1909, while the said Frank Whitsett was so working as a miner, driller and laborer for the said defendant, Balaklala Consolidated Copper Company, in operating a drill at the face of the tunnel in pursuance of the said employment and at a place where he was required and directed by said defendant to work, the drill so operated by him ran into and exploded a charge of

*Page-number appearing at foot of page of original certified Record.

powder, then and at all times theretofore unknown to the said Frank Whitsett, and the said Frank Whitsett was thereby killed.

VII.

That the unsafeness of the place where the said Frank Whitsett was killed could have been by said defendant, Balaklala Consolidated Copper Company, discovered and known by the use and exercise by it of ordinary care and diligence, but the [2] same was unknown to the said Frank Whitsett.

VIII.

That the plaintiff herein was wholly dependent upon the said Frank Whitsett for subsistence and support, and by reason of his death is left utterly helpless and destitute and is damaged in the sum of Fifty Thousand (\$50,000.00) Dollars.

WHEREFORE, plaintiff prays judgment against the Balaklala Consolidated Copper Company, defendant, in the sum of Fifty Thousand (\$50,000.00) Dollars, and for his costs of action herein incurred.

C. S. JACKSON and

T. W. H. SHANAHAN,

Attorneys for Plaintiff.

State of California,

County of Shasta,—ss.

T. W. H. Shanahan, being duly sworn, says as follows:

1. I am one of the attorneys of the plaintiff in this action.

2. I have read the foregoing complaint and know the contents thereof and it is true of my own knowledge, except as to those matters therein stated on in-

4 *Balaklala Consolidated Copper Company*

formation and belief, and as to those matters, I believe it to be true.

3. The reason this verification is not made by the plaintiff is that he is not within the county of Shasta, which is the county where I reside.

T. W. H. SHANAHAN.

Subscribed and sworn to before me this 8th day of March, 1910.

[Seal of Said Superior Court]

S. N. WITHEROW,

Clerk. [3]

[Endorsed]: No. 4146. File 218. In the Superior Court of the State of California, County of Shasta. Department No. 2. Filed Mar. 8, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy Clerk. [4]

*In the Superior Court of the County of Shasta, State
of California, Department 2.*

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation, JOHN DOE
and RICHARD ROE,

Defendants.

Summons.

Action brought in the Superior Court of the County of Shasta, State of California, and the Complaint filed in said County of Shasta in the office of the Clerk of said Superior Court.

The People of the State of California Send Greeting to Balaklala Consolidated Copper Company, a Corporation, John Doe and Richard Roe, Defendants.

You are hereby required to appear in an action brought against you by the above-named plaintiff in the Superior Court of the County of Shasta, State of California, and to answer the Complaint filed therein, within ten days (exclusive of the day of service) after the service on you of this Summons, if served within said County; if served elsewhere, within thirty days.

And you are hereby notified that if you fail to appear and answer, the plaintiff will take judgment for any money or damages demanded in the Complaint as arising upon contract, or will apply to the Court for any other relief demanded in the Complaint.

Witness my hand and seal of said Superior Court of the County of Shasta, State of California, this 8th day of March, A. D. 1910.

[Seal of said Superior Court.]

S. N. WITHEROW,

Clerk. [5]

[Endorsed]: Filed Apr. 27, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy Clerk.

Rec'd. Mar. 17, 1910—190—at 3:30 P. M.

J. L. MONTGOMERY,

Sheriff.

By Alex. Ludwig,

Deputy. [6]

Sheriff's Office,
County of Shasta,
State of California,—ss.

I hereby certify that I received the within Summons on the 17th day of March, A. D. 1910, and personally served the same upon the Balaklala Consolidated Copper Company, a corporation, by delivering to and leaving with R. T. White, the managing agent of the said Balaklala Consolidated Copper Company, a corporation, in the County of Shasta, State of California, on the 25th day of April, A. D. 1910, a copy of said Summons; and that the copy Summons, so delivered to and left with said R. T. White, as managing agent of said defendant corporation, was attached to a copy of the Complaint in said action.

Dated at Redding, Calif., this 26th day of April, A. D. 1910.

JAS. L. MONTGOMERY,
Sheriff.

Sheriff's Fee, \$.75¢. [7]

*In the Superior Court of the County of Shasta, State
of California.*

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Notice of Motion for Order of Removal.

To Messrs. C. S. Jackson and T. W. H. Shanahan,
Attorneys for Plaintiff.

Please take notice that the defendants, Balaklala Consolidated Copper Company, a corporation, John Doe and Richard Roe, will, on Saturday, the 14th day of May, 1910, at ten o'clock A. M., or as soon thereafter as counsel can be heard, move the Court, at the courtroom thereof, at Redding, in the county of Shasta, State of California, for an order removing said cause to the Circuit Court of the United States, for the Ninth Circuit, Northern District of California, in accordance with the petition of the defendants, a copy of which is hereto attached.

Dated this 3d day of May, A. D. 1910.

C. H. WILSON,

Attorney for Defendants, Balaklala Consolidated
Copper Company, a Corporation, John Doe and
Richard Roe. [8]

*In the Superior Court of the County of Shasta, State
of California.*

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

**Petition for Removal to United States Circuit Court
on Ground of Diverse Citizenship.**

To the Honorable Superior Court of Shasta County,
State of California:

The petition of the Balaklala Consolidated Copper Company, a corporation, and John Doe and Richard Roe, the defendants in the above-entitled action, respectfully shows to this Honorable Court:

That your petitioners are the defendants in the above-entitled action.

That said action has been begun against them in the above-entitled court by said plaintiff, and that said action is of a civil nature.

That plaintiff in his complaint herein claims in substance: That on the 9th day of March, 1909, the defendant, Balaklala Consolidated [9] Copper Company, was engaged in tunnelling, working and operating a certain mine known as the Balaklala Mine, near Coram, California. That on said day Frank Whitsett was employed by the said defendant to work in said mine, and on said day was engaged in the work of operating a drill in a tunnel in said mine, and that on said day said Balaklala Consolidated Copper Company failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for said Frank Whitsett to perform his said labor, and that while so working in said tunnel and operating the drill aforesaid, it ran into and exploded a charge of powder, thereby causing the death of said Frank Whitsett. That the plaintiff is the father and heir at law of said Frank

Whitsett, and by reason of his death has been damaged in the sum of Fifty Thousand Dollars (\$50,000.00). That no cause of action is stated in said complaint against the defendant, John Doe and Richard Roe.

That your petitioners dispute said claim and deny that said defendant, Balaklala Consolidated Copper Company, was careless or negligent in any manner proximately or at all causing the accident and death complained of, and deny any and all liability in law to respond in damages to the claim of the plaintiff as set forth in said complaint.

That the matter in dispute in this action exceeds the sum of Two Thousand Dollars (\$2,000.00), exclusive of interest and costs.

That the controversy in this action and every issue of fact and law therein is wholly between citizens of different states and which can be fully determined as between them, that is to say: The plaintiff, James Whitsett, is now and was at the time of the filing of the complaint in this action, a citizen and [10] resident of the State of California, and that the defendant, the Balaklala Consolidated Copper Company, a corporation, was then and still is a corporation duly organized and doing business under and by virtue of the laws of the State of Nevada, and a citizen and resident of the State of Nevada, and that the defendants, John Doe and Richard Roe, were then and still are citizens and residents of the State of Nevada.

That the time for your petitioners, as defendant in this action, to answer or plead to the complaint

10 *Balaklala Consolidated Copper Company*

in this action, has not yet expired, and will not expire until the 5th day of May, 1910, and your petitioners have not yet filed or in any way appeared therein.

That your petitioners herewith present a good and sufficient bond, as provided by the statute in such cases, that it will, on or before the first day of the next ensuing session of the United States Circuit Court for the Ninth Circuit, Northern District of California, file therein a transcript of the record of this action, and for the payment of all costs which may be awarded by the said Court, if the said Circuit Court shall hold that said suit was wrongfully or improperly removed thereto.

Your petitioners, therefore, pray that this Court proceed no further herein, except to make the order of removal, as required by law, and to accept the bond presented herewith, and direct a transcript of the record herein to be made for said Court, as provided by law, and as in duty bound your petitioners will ever pray.

Dated this 3d day of May, A. D. 1910.

BALAKLALA CONSOLIDATED COP-
PER COMPANY, a Corporation,

By C. H. WILSON,
Its Attorney. [11]

JOHN DOE,
By C. H. WILSON,
His Attorney.

RICHARD ROE,
By C. H. WILSON,
His Attorney.

C. H. WILSON,
Attorney for Defendants. [12]

State of California,

City and County of San Francisco,—ss.

C. H. Wilson, being duly sworn, deposes and says: That he is the attorney for the defendants in the above-entitled action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and, as to such matters, that he believes it to be true. That the facts stated in said petition are within the knowledge of affiant.

C. H. WILSON.

Subscribed and sworn to before me, this 3d day of May, 1910.

[Notarial Seal]

C. B. SESSIONS,

Notary Public in and for the City and County of
San Francisco, State of California. [13]

[Endorsed]: No. 4146. 218. Filed, May 4, 1910.
S. N. Witherow, Clerk. By W. O. Blodgett, Deputy.
[14]

*In the Superior Court of the County of Shasta, State
of California.*

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Order of Removal.

This cause coming on for hearing upon the application of the defendants herein for an order transferring this cause to the United States Circuit Court for the Ninth Circuit, Northern District of California, and it appearing to the Court that the defendants have filed their petition for such removal in due form of law, and that the defendants have filed their bond duly conditioned with good and sufficient sureties, as provided by law, and it appearing to the Court that it is a proper case for removal to said Circuit Court,—

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that this cause be, and it hereby is, removed to the United States Circuit Court, for the Ninth Circuit, Northern District of California, and the Clerk is hereby directed to make up the record in said cause for transmission to said court forthwith.

Done in open court this 14th day of May, A. D. 1910.

J. E. BARBER,
Judge. [15]

*In the Superior Court of the County of Shasta, State
of California.*

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS:
That the undersigned,

UNITED SURETY COMPANY

a corporation duly organized and doing business under the laws of the State of Maryland, and duly licensed to transact the business of a surety company in the State of California, is held and firmly bound unto James Whitsett, plaintiff in the above-entitled cause, his heirs, personal representatives and assigns, in the sum of ONE THOUSAND DOLLARS, lawful money of the United States of America, for the payment of which well and truly to be made, the undersigned binds itself and its successors firmly by these presents.

**THE CONDITIONS OF THIS OBLIGATION
ARE SUCH, THAT**

WHEREAS, the Balaklala Consolidated Copper Company, a Corporation, John Doe and Richard Roe, the defendants above named, have applied by petition to the Superior Court of the State of California, in and for the County of Shasta, for the removal of a certain cause therein pending wherein James Whitsett is plaintiff and the said Balaklala Consolidated Copper Company, a Corporation, and John Doe and Richard Roe are defendants, to the Circuit Court of the United States for the Ninth Circuit, Northern District of California, [16] for further proceedings on grounds in the said petition set forth, and that all further proceedings in said

action in said Superior Court be stayed.

NOW, THEREFORE, if your petitioners, the said Balaklala Consolidated Copper Company, a corporation, John Doe and Richard Roe, shall enter in said Circuit Court of the United States for the Ninth Circuit, Northern District of California, aforesaid, on or before the first day of the next regular session, a copy of the records of said suit, and shall pay or cause to be paid, all costs that may be awarded therein by said Circuit Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation shall be void, otherwise shall remain in full force and effect.

IN WITNESS WHEREOF, the said United Surety Company, a corporation, as aforesaid, has duly caused these presents to be signed with its corporate name and its corporate seal to be hereto affixed this 3d day of May, A. D. 1910.

UNITED SURETY COMPANY,

By D. DUNCAN,

Resident Vice-President.

Attest: J. M. HOYT,

Resident Ass't. Sec'y.

No. 4146. 218. Filed May 4, 1910. S. N. Witherow, Clerk. By W. O. Blodgett, Deputy. [17]

County Clerk's Office,

County of Shasta,—ss.

I, S. N. Witherow, County Clerk of the County of Shasta, and ex-officio Clerk of the Superior Court thereof, do hereby certify the foregoing to be a full and correct copy of the Complaint, Summons,

Sheriff's Return, Notice of Motion for Order of Removal, Petition for Removal to United States Circuit Court, Bond on Removal, and Order of Removal in James Whitsett, Plaintiff, vs. Balaklala Consolidated Copper Company, a Corporation, John Doe and Richard Roe, Defendants, now on file and of record in my office.

WITNESS my hand and the seal of said Court this 16th day of May, 1910.

[Seal]

S. N. WITHEROW,

Clerk.

By W. O. Blodgett,

Deputy.

[Endorsed]: Filed July 6th, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[18]

In the Circuit Court of the United States in and for the Ninth Circuit, Northern District of California.

JAMES WHITSETT,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Demurrer [to Complaint].

Comes now the defendants above named and demur to the complaint of the plaintiff herein and as grounds for demurrer state and allege:

I.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant Balaklala Consolidated Copper Company, a Corporation.

II.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant John Doe.

III.

That said complaint does not state facts sufficient to constitute a cause of action against the defendant Richard Roe.

IV.

That said complaint is uncertain, inasmuch as it does not appear therein, nor can it be ascertained therefrom, who are the heirs at law of Frank Whitsett, deceased, nor does it appear therein nor can it be ascertained therefrom, [19] whether the plaintiff James Whitsett is the sole heir at law of said Frank Whitsett, deceased, or whether there are other heirs at law living and not joined as parties to this action.

WHEREFORE, these defendants pray that the complaint of the plaintiff herein be dismissed and that they have judgment for their costs and disbursements most wrongfully sustained.

Dated this 6th day of July, A. D. 1910.

C. H. WILSON,
Attorney for Defendants.

[Endorsed]: Filed Jul. 6, 1910. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[20]

At a stated term, to wit, the July term, A. D. 1912, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 3d day of October, in the year of our Lord one thousand nine hundred and ten. Present: The Honorable WILLIAM C. VAN FLEET, Judge.

No. 15,144.

JAMES WHITSETT

vs.

BALAKLALA CONSOLIDATED COPPER CO.
et al.

Order Sustaining Demurrer [to Complaint].

Defendant's demurrer to the complainant herein came on this day to be heard and after argument by counsel for both sides was submitted and being considered by the Court it was ordered that said demurrer be and the same is hereby sustained.
[21]

*In the Circuit Court of the United States, in and for
the Ninth Circuit, Northern District of Cali-
fornia.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased, and JAMES
WHITSETT,

Plaintiffs,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Amended and Supplemental Complaint.

The plaintiffs, by leave of the Court first had and obtained, file this, their amended and supplemental complaint, and for cause of action allege:

1. That Frank Whitsett died on the 9th day of March, 1909; that thereafter, to wit, on the 13th day of December, 1910, in the matter of the estate of said decedent, the Superior Court of the City and County of San Francisco, State of California, by its order duly given and made, appointed plaintiff, J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, and said J. E. Reardon thereupon qualified as such administrator and letters of administration, upon said estate, were thereupon issued to him; that said order has never been vacated, modified, nor set aside and said letters of administration have never been revoked and plaintiff is now and ever since the said 13th day of De-

ember, 1910, has been duly appointed, qualified, and acting Administrator of the Estate of Frank Whitsett, Deceased.

2. That the defendant, Balaklala Consolidated Copper Company, is and was, at all the times herein mentioned, a private corporation, duly organized and existing under and pursuant to the laws of the State of Nevada, and is now, and at all times herein mentioned was engaged in the business of mining and operating [22] a quartz mine situate in the county of Shasta, State of California.

3. That the defendants John Doe and Richard Roe are sued herein by fictitious names and plaintiffs pray that when their true names are ascertained they may be inserted herein with apt and proper words to charge them and each of them.

4. That on the 9th day of March, 1909, the said defendant, Balaklala Consolidated Copper Company, was engaged in tunneling, working and operating that certain mine commonly known as and called the "Balaklala Mine," near Coram, California.

5. That prior to said 9th day of March, 1909, the aforesaid Frank Whitsett, then aged twenty-one (21) years, or thereabouts, was employed by the said defendant, Balaklala Consolidated Copper Company, as miner, driller, and laborer, to work in said defendant's mine, and that said Frank Whitsett was, on said 9th day of March, 1909, in pursuance of said contract of employment, and at No. 400 level, and as such miner, driller and laborer, engaged in the work of operating a drill in a tunnel in said mine for said defendant corporation.

6. That the said defendant, Balaklala Consolidated Copper Company, failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable, and proper place for the said Frank Whitsett to perform his said labor as aforesaid, and particularly in this:

That on the 9th day of March, 1909, while the said Frank Whitsett was working as a miner, driller, and laborer for the said defendant, Balaklala Consolidated Copper Company, in operating a drill at the face of the tunnel in pursuance of the said employment and at a place where he was required and directed by said defendant to work, the drill so operated by him ran into [23] and exploded a charge of powder, which had been negligently left in said position by said defendant, Balaklala Consolidated Copper Company, and the presence of which was then and at all times theretofore unknown to the said Frank Whitsett; that the said Frank Whitsett was killed by and as a result of said explosion.

7. That the unsafeness of the place where the said Frank Whitsett was killed could have been by said defendant, Balaklala Consolidated Copper Company, discovered and known by the use and exercise by it of ordinary care and diligence, but the same was unknown to the said Frank Whitsett.

8. That James Whitsett, father of said decedent, is the only heir at law of said Frank Whitsett, Deceased.

9. That James Whitsett, father of said decedent, was wholly dependent upon the said Frank Whitsett for subsistence and support, and by reason of

his death is left utterly helpless and destitute.

10. That by reason of the negligence of the defendant Balaklala Consolidated Copper Company in causing the death of said Frank Whitsett, as aforesaid, plaintiffs have sustained damages in the sum of Fifty Thousand (\$50,000.00) Dollars.

WHEREFORE, plaintiffs pray judgment against said defendants in the sum of Fifty Thousand (\$50,000.00) Dollars and for their costs of suit herein incurred.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiffs. [24]

State of California,
City and County of San Francisco,—ss.

J. E. Reardon, being first duly sworn, deposes and says: That he is the administrator of the Estate of Frank Whitsett, Deceased, and one of the plaintiffs in the above-entitled action; that he has read the foregoing amended complaint and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information or belief, and that as to those matters he believes it to be true.

J. E. REARDON.

Subscribed and sworn to before me this 30th day of December, 1910.

[Seal] W. H. PYBURN,
Notary Public in and for the City and County of
San Francisco, State of California.

Receipt of a copy of the within Amended and

22 *Balaklala Consolidated Copper Company*

Supplemental Complaint is hereby admitted this
30th day of December, 1910.

C. H. WILSON,

Attorney for said Defendant.

[Endorsed]: Filed Dec. 30, 1910. Southard Hoff-
man, Clerk. By J. A. Schaertzer, Deputy Clerk.
[25]

*In the Circuit Court of the United States, in and for
the Ninth Circuit, Northern District of Cali-
fornia.*

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased, and JAMES
WHITSETT,

Plaintiffs,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Demurrer to Amended and Supplemental Complaint.

Now come the defendants above named and demur
to the complaint of the plaintiffs herein, and as
grounds for demurrer state and allege:

I.

That said amended and supplemental complaint
does not state facts sufficient to constitute a cause
of action against the defendant Balaklala Consoli-
dated Copper Company, a corporation.

II.

That said amended and supplemental complaint

does not state facts sufficient to constitute a cause of action against the defendant John Doe.

III.

That said amended and supplemental complaint does not state facts sufficient to constitute a cause of action against the defendant Richard Roe.

IV.

That there is a misjoinder of parties plaintiff [26] in said amended and supplemental complaint, inasmuch as the administrator is joined as a plaintiff with James Whitsett, the father and heir at law of Frank Whitsett, deceased, which heir at law has no right of action against the defendants.

V.

That said amended and supplemental complaint pretends to state a cause of action that is barred by the provisions of Section 340 of the Code of Civil Procedure.

VI.

That said amended and supplemental complaint is uncertain, inasmuch as it does not appear therein, nor can it be ascertained therefrom what sums of money the said Frank Whitsett provided for the subsistence and support of his father, James Whitsett.

WHEREFORE, these defendants pray that the amended and supplemental complaint of the plaintiffs herein be dismissed without leave to amend, and that they have judgment for their costs and disbursements herein most wrongfully sustained.

Dated this 9th day of January, 1911.

C. H. WILSON,

Attorney for Defendants.

24 *Balaklala Consolidated Copper Company*

Service of the within Demurrer and receipt of a copy thereof is hereby acknowledged this 9th day of January, 1911.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiffs. [27]

[Endorsed]: Filed Jan. 10, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.
[28]

*In the Circuit Court of the United States, in and for
the Ninth Circuit, Northern District of California.*

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased, and JAMES
WHITSETT,

Plaintiffs,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Notice of Motion to Substitute.

To the Defendants in the Above-entitled Action, and
C. H. Wilson, Esq., Their Attorney:

You and each of you will please take notice that on Monday, the 23d day of January, 1911, at the opening of the court on that day, or as soon thereafter as counsel can be heard, at the courtroom of the above-entitled Circuit Court, in the United States Postoffice and Courthouse Building, in the

City and County of San Francisco, State of California, we shall move the above-named court for an order substituting J. E. Reardon, administrator of the estate of Frank Whitsett, deceased, as plaintiff in the above-entitled action, in the place and stead of James Whitsett.

Said motion will be made on the ground that J. E. Reardon has been duly and regularly appointed administrator of the estate of said Frank Whitsett, deceased, since the commencement of the above-entitled action by said James Whitsett; and will be based on this notice of motion and on all the papers, records, files, and proceedings in said action.

Dated San Francisco, Cal., January 17, 1911.

W. M. CANNON and

C. S. JACKSON,

Attorneys for Plaintiffs. [29]

Receipt of a copy of the within Notice is hereby admitted this 19th day of January, 1911.

C. H. WILSON,

Attorney for Defendants.

[Endorsed]: Filed Jan. 23, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk.

[30]

[Order Denying Motion to Strike and Sustaining, in Part, Demurrer to Amended and Supplemental Complaint, etc.]

At a stated term, to wit, the March term, A. D. 1911, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and

for the Northern District of California, held at the courtroom in the City and County of San Francisco, on Monday, the 29th day of May, in the year of our Lord one thousand nine hundred and eleven. Present: The Honorable WILLIAM C. VAN FLEET, Judge.

No. 15,144.

JAMES WHITSETT et al.

vs.

BALAKLALA CONSOLIDATED COPPER CO.
et al.

Plaintiffs' motion for leave to substitute party plaintiff and defendants' demurrer to amended and supplemental complaint, and motion to strike out same heretofore heard and submitted being now fully considered, and the Court having rendered its oral opinion thereon, it was ordered, in accordance with said opinion, that said motion to strike out be, and the same is hereby, denied, and that said demurrer be, and the same is hereby, sustained (in part) with leave to plaintiff to file an amended complaint, if so advised, and that plaintiffs' motion for leave to substitute party plaintiff be granted. [31]

*In the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER
COMPANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Second Amended Complaint.

The plaintiff, by leave of the Court first had and obtained, files this his second amended complaint, and for cause of action alleges:

1. That Frank Whitsett died on the 9th day of March, 1909; that thereafter, to wit, on the 13th day of December, 1910, in the matter of the estate of said decedent, the Superior Court of the City and County of San Francisco, State of California, by its order duly given and made, appointed plaintiff, J. E. Reardon, administrator of the estate of Frank Whitsett, deceased, and said J. E. Reardon thereupon qualified as such administrator and letters of administration upon said estate were thereupon issued to him; that said order has never been vacated, modified, nor set aside and said letters of administration have never been revoked and plaintiff is now and ever since the said 13th day of December, 1910, has been the duly appointed, qualified, and acting administrator of the

28 *Balaklala Consolidated Copper Company*

estate of Frank Whitsett, deceased.

2. That the defendant Balaklala Consolidated Copper Company is, and was at all the times herein mentioned, a private corporation, duly organized and existing under and pursuant to the laws of the State of Nevada, and is now, and at all times herein mentioned was, engaged in the business of mining and operating a quartz mine, situate in the county of Shasta, State of California. [32]

3. That the defendants John Doe and Richard Roe are sued herein by fictitious names, and plaintiff prays that when their true names are ascertained, they may be inserted herein with apt and proper words to charge them and each of them.

4. That on the 9th day of March, 1909, the said defendant Balaklala Consolidated Copper Company was engaged in tunneling, working, and operating that certain mine commonly known as and called the "Balaklala Mine," near Coram, California.

5. That prior to said 9th day of March, 1909, the aforesaid Frank Whitsett, then aged twenty-one years, or thereabouts, was employed by the said defendant Balaklala Consolidated Copper Company as miner, driller and laborer, to work in said defendant's mine, and that said Frank Whitsett was, on said 9th day of March, 1909, in pursuance of said contract of employment, and at No. 400 level, and as such miner, driller and laborer, engaged in the work of operating a drill in a tunnel in said mine for said defendant corporation.

6. That said defendant Balaklala Consolidated Copper Company failed and neglected to exercise

ordinary care in providing and maintaining a safe, suitable and proper place for the said Frank Whitsett to perform his said labor as aforesaid, and particularly in this:

That on the 9th day of March, 1909, while the said Frank Whitsett was working as a miner, driller, and laborer for the said defendant Balaklala Consolidated Copper Company, in operating a drill at the face of the tunnel, in pursuance of the said employment and at a place where he was required and directed by said defendant to work, the drill so operated by him ran into and exploded a charge of powder, which had been negligently left in said position by said defendant Balaklala Consolidated Copper [33] Company, and the presence of which was then and at all times theretofore unknown to the said Frank Whitsett; that the said Frank Whitsett was killed by and as a result of said explosion.

7. That the unsafeness of the place where the said Frank Whitsett was killed could have been by said defendant Balaklala Consolidated Copper Company discovered and known, by the use and exercise by it of ordinary care and diligence, but the same was unknown to the said Frank Whitsett.

8. That James Whitsett, father of said decedent, is the only heir at law of said Frank Whitsett, deceased.

9. That James Whitsett, father of said decedent, was wholly dependent upon the said Frank Whitsett for subsistence and support, and by reason of his death is left utterly helpless and destitute.

10. That by reason of the negligence of the de-

feudant Balaklala Consolidated Copper Company in causing the death of said Frank Whitsett, as afore-said, plaintiff has sustained damage in the sum of Fifty Thousand Dollars (\$50,000).

WHEREFORE, plaintiff prays judgment against said defendants in the sum of Fifty Thousand Dollars (\$50,000), and for his costs of suit herein incurred.

C. S. JACKSON and
WM. M. CANNON,
Attorneys for Plaintiff. [34]

State of California,
City and County of San Francisco,—ss.

J. E. Reardon, being duly sworn, deposes and says: That he is the administrator of the estate of Frank Whitsett, deceased, and the plaintiff in the above-entitled action; that he has read the foregoing second amended complaint, and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated on information or belief, and that as to those matters he believes it to be true.

J. E. REARDON.

Subscribed and sworn to before me, this 18th day of July, 1911.

[Seal] W. H. PYBURN,
Notary Public in and for the City and County of San Francisco, State of California.

Service and receipt of a copy of the within Second Amended Complaint is hereby admitted this 18th day of July, 1911.

C. H. WILSON,
Attorney for Defendant.

[Endorsed]: Filed July 18, 1911. Southard Hoffman, Clerk. [35]

*In the Circuit Court of the United States, for the
Ninth Circuit, Northern District of California.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Demurrer to Second Amended Complaint.

Now come the defendants above named, and demur to the second amended complaint of the plaintiff herein, and as grounds for demurrer state and allege:

I.

That said second amended complaint does not state facts sufficient to constitute a cause of action against the defendant Balaklala Consolidated Copper Company, a corporation.

II.

That said second amended complaint does not state facts sufficient to constitute a cause of action against the defendant, John Doe.

III.

That said second amended complaint does not state facts sufficient to constitute a cause of action against the defendant, Richard Roe. [36]

IV.

That said second amended complaint pretends to state a cause of action that is barred by the provisions of section 340 of the Code of Civil Procedure, inasmuch as the original complaint herein was filed by one James Whitsett, the father and heir at law of Frank Whitsett, deceased, mentioned in said second amended complaint, and that said James Whitsett had no cause of action to recover damages for the death of said Frank Whitsett, and that no amended complaint was filed herein within one year after the death of said Frank Whitsett, and that consequently the statute of limitations ran and a cause of action cannot now be stated by the administrator of said Frank Whitsett, deceased, under the provisions of section 1970 of the Civil Code.

V.

That said second amended complaint is uncertain inasmuch as it does not appear therein nor can it be ascertained therefrom what sums of money the said Frank Whitsett provided for the subsistence and support of his father James Whitsett.

WHEREFORE, these defendants pray that the second amended complaint of the plaintiff herein be dismissed without leave to amend, and that they have judgment for their costs and disbursements herein most wrongfully sustained.

Dated this 21st day of August, 1911.

C. H. WILSON,

Attorney for Defendants. [37]

CERTIFICATE OF COUNSEL.

The undersigned, counsel for the defendants in

the above-entitled action, does hereby certify that the foregoing demurrer to the second amended complaint herein is not filed for delay, and that in the opinion of said counsel the same is well taken in point of law.

Dated this 21st day of August, 1911.

C. H. WILSON,

Counsel for Defendant.

Receipt of a copy of Demurrer is hereby acknowledged this 21st day of August, 1911.

C. S. JACKSON and

W. M. CANNON,

Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 22, 1911. Southard Hoffman, Clerk. By J. A. Schaertzer, Deputy Clerk. [38]

At a stated term, to wit, the November term, A. D. 1911, of the District Court of the United States of America, in and for the Northern District of California, Second Division, held at the courtroom in the City and County of San Francisco, on Tuesday, the 2d day of January, in the year of our Lord one thousand nine hundred and twelve. Present: The Honorable WILLIAM C. VAN FLEET, District Judge.

No. 15,144.

J. E. REARDON, Admr., etc.,

vs.

BALAKLALA CONSOLIDATED COPPER CO.
et al.

Order Overruling Demurrer [to Second Amended Complaint and Denying Motion to Strike].

Defendant's demurrer to the second amended complaint and motion to strike out parts of second amended complaint heretofore heard and submitted being now fully considered and the Court having rendered its opinion in writing it was ordered, in accordance therewith, that said demurrer be overruled and that said motion to strike out be denied.
[39]

In the District Court of the United States, for the Ninth Circuit, Northern District of California.

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, JOHN DOE, and
RICHARD ROE,

Defendants.

Answer to Second Amended Complaint.

Now come the defendants above named and for their answer to the second amended complaint of the plaintiff herein admit, deny, state and allege as follows, to wit:

I.

These defendants admit each and every allegation, matter and thing contained in paragraphs one (1),

two (2), three (3), four (4) and five (5), except that these defendants have no information or belief upon the subject sufficient to enable them to answer the allegations of the second amended complaint in that behalf, and, placing their denials on that ground, deny that on and prior to said 9th day of March, 1909, the said Frank Whitsett was of the age of twenty-one years or thereabouts, and in that behalf alleges that these defendants are informed and believe, and on such information and belief allege, that on said day said Frank Whitsett was of the age of about twenty-three years. In like manner these defendants deny that on said day, or on any other day, said Frank Whitsett, [40] in pursuance of his contract of employment, or otherwise or at all, was engaged in the work of operating a drill, or other machine or appliance, in a tunnel, or elsewhere, in the mine described in the second amended complaint, or in any mine, for the defendant corporation, or for any person or persons.

II.

Defendants expressly deny that the defendant, Balaklala Consolidated Copper Company, failed and neglected, or failed or neglected, to exercise ordinary, or any, care in providing and maintaining, or providing or maintaining, a safe, suitable and proper, or safe or suitable or proper, place for the said Frank Whitsett to perform his said, or any labor, as in the second amended complaint alleged, or otherwise or at all, or particularly in this, that on the 9th day of March, 1909, or on any other day, while the said Frank Whitsett was working as a miner,

driller and laborer, or miner or driller or laborer, or otherwise or at all, for the defendant corporation in operating a drill, or any appliance, at the face of the tunnel, or elsewhere, in pursuance of the said, or any, employment or at a place where he was required and directed, or required or directed, by the said defendant corporation to work, or at any other place, the drill so, or in any manner, operated by him ran into and exploded, or ran into or exploded, a charge of powder, which had been negligently, or at all, left in said, or any, position by said defendant corporation, or the presence of which was then and at all times, or then or at any time or times, theretofore, or at all, unknown to said Frank Whitsett. In like manner deny that said Frank Whitsett was killed by or as a result of said exploding, or of any explosion, occurring as [41] described or set forth in plaintiff's second amended complaint.

III.

In like manner these defendants deny that the unsafeness of the place where said Frank Whitsett was killed, or of any other place, could have been or was by the defendant corporation discovered and known, or discovered or known, by the use and exercise, or use or exercise, by it of ordinary, or any, care and diligence, or care or diligence, but that the same was unknown to said Frank Whitsett.

IV.

These defendants have no information or belief upon the subject sufficient to enable them to answer the allegations of the second amended complaint in that behalf, and, placing their denials on that

ground, deny that James Whitsett is the father of said decedent, or that he is the only, or any, heir at law of said Frank Whitsett, deceased. In like manner deny that said James Whitsett was wholly, or at all, dependent upon said Frank Whitsett for subsistence and support, or subsistence or support, or that by reason of his death, or otherwise or at all, said James Whitsett is left utterly helpless and destitute, or helpless or destitute.

V.

These defendants expressly deny that by reason of *of* the negligence of the defendant corporation in causing the death of said Frank Whitsett, as in the second amended complaint alleged, or otherwise or at all, plaintiff has sustained damage in the sum of Fifty Thousand Dollars, or in any other sum or amount, whatsoever.

VI.

Further answering, these defendants deny that they, or [42] either of them, were guilty of any carelessness or negligence whatsoever, as in the second amended complaint alleged, or otherwise or at all, whereby Frank Whitsett was hurt or injured or killed or damaged in any particular or manner, whatsoever, or whereby James Whitsett was damaged in any particular or to any extent, whatsoever.

VII.

Further answering these defendants allege that the second amended complaint of the plaintiff does not state facts sufficient to constitute a cause of action against the defendants, John Doe and Richard Roe, or either of them.

VIII.

For a further and separate defense herein, these defendants allege that they were not guilty of carelessness, negligence or improper conduct, as in the second amended complaint alleged, or otherwise or at all, and say that the injuries therein described, if any there were, were caused by the fault and negligence of said Frank Whitsett.

IX.

For a further and separate defense herein, these defendants allege that they were not guilty of carelessness, negligence or improper conduct, as in the second amended complaint alleged, or otherwise or at all, and say that the injuries and death therein described, if any there were, were the result of and due to the fact that said Frank Whitsett encountered obvious or known risks or dangers which were incident to the work in which he was employed at the time of the accident described in the said second amended complaint, and which risks or dangers had been and were assumed by said Frank Whitsett in his contract of employment. [43]

X.

For a further and separate defense herein, these defendants allege that they were not guilty of carelessness, negligence or improper conduct, as in the second amended complaint alleged, or otherwise or at all, and say that the injuries and death therein described, if any there were, were caused by the fault and negligence of a coemployee of said Frank Whitsett.

WHEREFORE, these defendants pray that the second amended complaint of the plaintiff herein be dismissed, and that they have judgment for their costs and disbursements herein most wrongfully sustained.

Dated this 9th day of February, 1912.

C. H. WILSON,

Attorney for Defendants. [44]

State of California,

City and County of San Francisco,—ss.

E. B. Braden, being duly sworn, deposes and says: That he is an officer, to wit, the General Manager of Balaklala Consolidated Copper Company, a corporation, one of the defendants in the above-entitled action; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief; and, as to such matters, that he believes it to be true.

E. B. BRADEN.

Subscribed and sworn to before me this 10th day of February, 1912.

[Seal]

CHARLES EDELMAN,

Notary Public in and for the City and County of San Francisco, State of California.

My Commission Expires April 9th, 1914.

Service of the within Answer to Second Amended Complaint and receipt of a copy thereof is hereby acknowledged this 10th day of February, 1912.

C. S. JACKSON and

W. M. CANNON,

Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 10, 1912. Jas. P. Brown,
Clerk. By J. A. Schaertzer, Deputy Clerk. [45]

*In the District Court of the United States, Northern
District of California, Second Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,
Defendant.

Verdict.

We, the jury, find in favor of the plaintiff and as-
sess the damages against the defendant in the sum
of Thirty-five Hundred (\$3,500.00) and no/100 Dol-
lars.

JOHN T. FOGARTY,
Foreman.

[Endorsed]: Filed May 23, 1912. Jas. P. Brown,
Clerk. By W. B. Maling, Deputy Clerk. [46]

*In the District Court of the United States, in and for
the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

Judgment on Verdict.

This cause having come on regularly for trial upon the 16th day of May, 1912, being a day in the March, 1912, Term of said court, before the Court and a jury of twelve men, duly impaneled and sworn to try the issue joined herein, William A. Cannon and C. S. Jackson, Esqs., appearing as attorneys for the plaintiff, and Charles H. Wilson, Esq., and Messrs. Chickering & Gregory, appearing as attorneys for defendant, and the trial having been proceeded with on the 17th, 21st, 22d, and 23d days of May, all in said year and term, and evidence oral and documentary upon behalf of the respective parties having been introduced and closed, and the cause, after arguments of the attorneys and the instructions of the Court, having been submitted to the jury and the jury having subsequently rendered the following

42 *Balaklala Consolidated Copper Company*

verdict, which was ordered recorded, namely: "We, the jury, find in favor of the plaintiff and assess the damages against the defendant in the sum of Thirty-five Hundred (\$3,500.00) and no/100 Dollars. John T. Fogarty, Foreman," and the Court having ordered that judgment be entered in accordance with said verdict and for costs: [47]

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the Court that J. E. Reardon, administrator of the estate of Frank Whitsett, deceased, plaintiff, do have and recover of and from the Balaklala Consolidated Copper Company, a corporation, the sum of Three Thousand Five Hundred (\$3,500.00) Dollars, together with his costs in this behalf expended, taxed at \$266.40.

Judgment entered May 23, 1912.

JAS. P. BROWN,
Clerk.

By W. B. Maling,
Deputy Clerk.

A true copy.

[Seal]

Attest: JAS. P. BROWN,
Clerk.

By W. B. Maling,
Deputy Clerk.

[Endorsed]: Filed May 23d, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [48]

*In the District Court of the United States for the
Northern District of California.*

No. 15,144.

J. E. REARDON, Admr., etc.,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY et al.

Certificate to Judgment-roll.

I, Jas. P. Brown, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 23d day of May, 1912.

[Seal]

JAS. P. BROWN,
Clerk.

By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed May 23d, 1912. Jas P. Brown, Clerk. By J. A. Schaertzer, Deputy Clerk. [49]

*In the District Court of the United States, Northern
District of California, Second Division.*

J. E. REARDON, Administrator, etc.,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,

Defendants.

Opinion and Order Overruling Demurrer and Denying Motion to Strike Amended Complaint from Files.

WILLIAM CANNON and C. S. JACKSON, for
Plaintiff.

C. H. WILSON, for Defendants.

VAN FLEET, District Judge:

This is an action to recover for the death of an employee alleged to have been caused by the negligence of the employer. Section 1970 of the Civil Code of the State requires that such an action be maintained in the name of the legal representative of the deceased employee for the benefit of the next of kin in a certain order of precedence; and this is deemed the exclusive remedy. In this instance the father, being the next of kin and entitled to the benefit of the recovery, erroneously brought the action in his own name instead of that of the administrator of the deceased, under the mistaken supposition that the case fell within Section 377 of the Code of Civil Procedure; and before the error was established by a ruling on defendant's demurrer to that complaint, the time within which a new action could be commenced by the administrator had elapsed. The sole question [50] presented here calling for consideration is whether under these circumstances it was competent to allow the complaint to be amended by substituting the administrator as plaintiff in the action so commenced, in place of the father, and thus avoid bringing a new

action; or should the action have been dismissed. As the result of an application to that end, the Court heretofore allowed such substitution, and an amended complaint having been since filed in the name of the administrator, a demurrer thereto and motion to strike the same from the files is now interposed, and the question as to the propriety of the ruling has, with the Court's permission, been re-argued.

It is again strenuously insisted that such a change in the sole party plaintiff is not the proper subject of an amendment; that in effect the action of the Court was to allow, under the guise of an amendment, a new action to be brought in the name of the administrator after the time had elapsed in which he could originally maintain it; and as the amendment has relation to the commencement of the action, it will, if sustained, have the effect to deprive defendants of the right to interpose the plea of the statute, which, as claimed, had ripened into a bar when the amendment was allowed. In another form, the objection is that the right of action being in its inception purely statutory and given exclusively to the legal representative, the bringing of the action in the name of the father was wholly nugatory and ineffectual to arrest the running of the statute; and to allow the substitution now is in legal effect to extend the statutory limitation for bringing the action by the administrator. This position is pressed with such ingenuity as to make it plausible, but I do not regard it as sound. As indicated in granting the leave, it [51] involves

an erroneous conception of the legal effect of the omission sought to be corrected, and a too narrow construction of the purpose and effect of the statutes, both State and Federal (C. C. P., sec. 473; R. S., sec. 954), in providing the extent and character of relief that may be afforded by way of amendment, to avoid mistakes of the nature of that here involved. It should be borne in mind, as then stated, that the substantive cause of action counted on in the amended complaint has not been changed; it remains precisely the same as that stated in the original pleading. No new facts are alleged as a ground of recovery, the only change being in the name of the plaintiff and the capacity in which he sues; while the father still remains the beneficiary of the recovery sought. This being so, the change effected by the amendment is obviously in no just sense the bringing of a new action; it is one of form rather than of substance, and in the interests of justice is to be treated as such, rather than to adopt a view which would result in an irretrievable bar to all remedy. Under the modern doctrine, the discretionary power of the Court to such end is to be liberally exerted in favor of, rather than against, the disposition of a case upon its merits; and I am entirely satisfied after my further examination of the question induced by the reargument that, under the broad and comprehensive terms of Section 954, if not as well under the statute of the State, the defect involved is one which may be cured by amendment. It will not be necessary in support of this conclusion to discuss the many authorities

referred to in the briefs and considered by me on granting the order allowing the substitution; it will be sufficient, I think, to refer to some later cases not cited by counsel which have fallen under my observation, and which to my [52] mind very fully cover every phase of the question.

In the case of McDonald vs. State of Nebraska, 101 Fed. 171, the same question arose, under circumstances very similar, in legal effect, to those presented here. The action was originally commenced in the name of the State Treasurer against the receiver of an insolvent national bank, to recover certain moneys belonging to the State on deposit in the bank. A demurrer was interposed upon the ground that the Treasurer had no legal capacity to sue, and that from the averments of the petition it appeared that the State was the sole party in interest. The demurrer was sustained, but by leave of the Court the State of Nebraska was substituted as the sole plaintiff in place of the Treasurer. As so amended the petition was demurred to and the Court was asked to strike it from the files. This relief was denied, and judgment going for the plaintiff, the defendant appealed, urging "that the substitution of the State of Nebraska as plaintiff in the action was a change of the cause of action, and that as the statute of limitations had run against the plaintiff's claim before the substitution was made the cause of action was barred"; in effect the same objection made here. In deciding the case and overruling this objection, Judge Caldwell for the Court of Appeals first reviews the

cases on the subject from the Supreme Court of Nebraska, and reaches the conclusion that under the statute of that State, which will be found no broader or more liberal in terms than that of California, the allowance of the amendment was not only within the power of the Court, but that it would have been error to have refused it. "But," proceeds that learned Judge, "independent of the Nebraska Code and the decisions of the Supreme Court of that State, we would have no difficulty in upholding the judgment of the lower [53] Court in this case both upon principle and authority. The right and duty of the federal courts to allow amendments does not rest on State statutes only. It is conferred on them by the judiciary act of 1789. * * * The thirty-second section of that act was designed to free the administration of justice in the federal courts from all subtle, artificial, and technical rules and modes of proceeding in any way calculated to hinder and delay the determination of causes in those courts upon their very merits. This act emancipated the judicial department of the Government from the shackles of artificial and technical rules, which had theretofore been interposed to obstruct the administration of justice, as completely as the Revolution had emancipated the political department of the Government from foreign domination. This was done by investing the federal courts with plenary power to remove by amendment all such impediments to the attainment of justice. From the first, the Supreme Court of the United States grasped the object and purpose of this enactment. In re-

ferring to this section of the judiciary act, the Supreme Court of the United States, speaking by Mr. Justice Story, said:

“ ‘The authority to allow such amendments is very broadly given to the courts of the United States by the thirty-second section of the judiciary act of 1789, c. 20 (now section 954, Rev. St. U. S.), and quite as broadly, to say the least, as it is possessed by any other courts in England or America, and it is upheld upon principles of the soundest protective policy.’—*Matheson’s Adm’rs v. Grant’s Adm’r*, 2 How. 263, 281.

“And Mr. Justice Miller, speaking from the circuit bench, declared:

“ ‘This section makes more liberal provision for the amendment of process, pleadings, and all proceedings in the federal courts, than any of the [54] modern codes. It is founded on common sense and justice, and ought to be regarded by the Circuit Courts as mandatory.’

“Under section 954 of the Revised Statutes the right of amendment extends to the ‘summons, writ, declaration, return, judgment, and other proceedings in civil causes in any court of the United States,’ and may be exercised at any stage of the case, even after trial and judgment. The extended and beneficent use made of the authority given by the section to make amendments is disclosed by a long line of decisions of the Supreme Court of the United States covering every step in a case from the summons to the verdict and judgment.”

And after citing numerous cases from the Supreme Court and other federal courts in support of the principles thus stated, it is said: "A defendant has an undoubted right to insist that the person entitled to recover on a cause of action set forth in a petition shall be brought on the record as the plaintiff in the action, to the end that he shall not be compelled to respond twice to the same demand; and that the one suit shall bar all others for the same cause of action. But it has come to be the settled law that where, either by mistake of law or fact, a suit is brought in the name of a wrong party, the real party in interest, entitled to sue upon the cause of action declared on, may be substituted as plaintiff, and the defendant derives no benefit whatever from such mistake; but the substitution of the name of the proper plaintiff has relation to the commencement of the suit, and the same legal effect as if the suit had been originally commenced in the name of the proper plaintiff. The name of the proper plaintiff may be brought on the record at any time during the progress of the cause, and may even be inserted after verdict and judgment. When [55] a wrong party has been named as plaintiff, the action will never be dismissed, and the proper plaintiff required to bring a new action, when the effect would be to let in the bar of the statute of limitations."

Judge Caldwell then proceeds to review all the leading authorities upon the subject from other State courts, and shows that they are fully in harmony with the conclusion reached by him.

This case is followed by two others from the same

court: *Franklin vs. Conrad-Stanford Co.*, 137 Fed. 737, and *Leahy vs. Haworth*, 141 Fed. 850.

In the first case the Court allowed a substitution of parties plaintiff, to which defendant objected so far as it affected a second count in the complaint, on the ground that the latter set up by way of amendment a new cause of action not pleaded in the original complaint, and that as to it the action must be deemed commenced when the amended complaint was filed; that the transfer to the substituted plaintiff was not during the pendency of the suit on the demand originally sued on, and to permit the substitution would be to give vitality to a suit which otherwise must have failed as instituted by one having no interest therein. In disposing of the objection that this could not be permitted under the Utah Code, it was said by the learned Judge of the court below:

“The provisions of the Utah Code with respect to amendments are extremely liberal. They are identical with the provisions of the codes of other states, which have been held to permit the substitution of the proper plaintiff where suit has been instituted by one not entitled to sue, and the defense has been interposed that some one else should have sued. The authorities on this question are collated in *McDonald vs. Nebraska*, 101 Fed. 171, [56] 41 C. C. A. 278. But it must be admitted that the Supreme Court of Utah has construed the Utah statute otherwise (*Skews vs. Dunn*, 3 Utah, 186, 2 Pac. 64; *Wilson vs. Kiesel*, 9 Utah, 397, 35 Pac. 488),

in that following the Supreme Court of California in the case of *Dubbers vs. Goux*, 51 Cal. 153.

“If the right to allow the substitution depended upon the provisions of the Utah Code, the Court would be embarrassed by these decisions of the Supreme Court of Utah construing that Code. But, as pointed out in *McDonald vs. Nebraska*, *supra*: ‘The right and duty of the federal courts to allow amendments does not rest on state statutes only; it is conferred on them by the judiciary act of 1789,’—now section 954, Rev. St. U. S.”

Judge Marshall then proceeds to quote from *McDonald vs. Nebraska* a portion of the language heretofore quoted therefrom, and in accordance with the principles announced in that case overruled the objection; and this ruling is affirmed by the Circuit Court of Appeals.

In the next case the bill was filed in the Circuit Court for the District of Nebraska to foreclose a mortgage held by the estate of a subject of Great Britain upon property in Nebraska. The bill was originally filed by the English executors, suing in their individual capacity under their common-law right as owners of the chattel; one of the complainants died and the bill was amended to continue the action in the name of the survivor, but still in his individual capacity; at the trial his right to maintain the action in that form being questioned, it was held that he must sue in his representative capacity, and leave was given to amend; he thereupon filed an

amended bill in his capacity of executor under his appointment by the English court, and by a later amendment set up that he had since procured letters testamentary on the estate of his testator in the probate court of Nebraska. This last proceeding was had, however, after the expiration of the statute of limitations, and the objection was made in the Court of [57] Appeals that the Circuit Court had erred in holding that the proceedings in the probate court of Nebraska, which were not commenced until more than ten years after the maturity of the debt and after the filing of the amended bill, might relate back to the date of the filing of the last amended bill, not only for the purpose of qualifying the plaintiff to sue, but also for the purpose of bringing the suit within the period of the statute of limitations. That objection was overruled, the Court holding that the action of the lower court was proper; that the amendment effected no substantive change in the legal aspects of the cause of action, which remained the same as in the beginning; that complainant having an inchoate right to enforce the obligation, the change of the pleading by setting up his legal qualification, notwithstanding such qualification did not exist at the date of the commencement of the action, was merely modal and formal and would relate back to the filing of the bill, notwithstanding the statute had run against the bringing of a new suit (citing *McDonald vs. Nebraska, supra*, and other cases). See, also, *Chicago G. W. Ry. Co. vs. Methodist Church*, 102 Fed. 85, where it is held that the fact that an action was brought in the name of

the wrong party as plaintiff was not ground for reversal, but that the appellate court would itself direct the substitution of the proper party.

The principles announced in these cases are clearly applicable to the circumstances presented here. As we have seen, no change has been worked in the form or substance of the cause of action set up; that remains in all respects the same. The father is now, as he was when the original complaint was filed, the real party in interest for whose benefit, under the express language of the statute, the action may be maintained. He has then a [58] right to have the action prosecuted; but the law says that that must be done through the instrumentality of the legal representative rather than that of the immediate beneficiary; and this purely formal requirement is all that is accomplished by the amendment allowed. Had the father procured himself, instead of the present plaintiff, to be appointed the administrator of his dead son's estate, as was his legal right, there could be no question, under the foregoing authorities, of his right to have himself in his representative capacity substituted as plaintiff in place of himself as an individual; and the chances are, if such had been the course pursued, the present objection would never have suggested itself. Can it make any difference in the application of the principle, or any more effect a substantial change in the legal status of the case, that he has seen fit to have another serve in that capacity? The representative is a mere formal instrumentality required by the statute to effectuate the purpose; it in no sense **partakes** of the

substance of the right who is **made the legal representative** to enforce it. The appointment of a stranger to that office no more makes the action in his name a new action in any material sense, than if the father had been appointed.

It is claimed that the statute of the State, as limited by the construction put upon it by the Supreme Court of the State, does not warrant the action of the Court; and *Dubbers vs. Goux*, 51 Cal. 153, referred to in the Utah case, is relied upon. The circumstances of that case were different from those of the present, and I am not satisfied that it sustains defendant's view; as to which see the later case of *Merced Bank vs. Price*, 9 Cal. App. 189. But, as we have seen, the inquiry is not very material [59] if, as I think I have shown, the action of the Court is warranted by the federal statute upon the subject. The statutes of the State may sometimes enlarge, but they can never restrict the powers of these courts. *Manitowoc Malting Co. vs. Fuechtwanger*, 169 Fed. 983, 987.

The demurrer will be overruled and the motion to strike the amended complaint from the files will be denied.

[Endorsed]: Filed January 2d, 1912. Jas. P. Brown, Clerk. By W. B. Maling, Deputy Clerk. [60]

*In the District Court of the United States for the
Northern District of California, Second Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,
Defendants.

Bill of Exceptions.

BE IT REMEMBERED that the above-entitled cause came on regularly for trial on Wednesday, the 15th day of May, 1913, before Honorable William C. Van Fleet, Judge of the above-entitled court, sitting with a jury, the plaintiff in this action appearing by his attorneys, William M. Cannon, Esq., and C. S. Jackson, Esq., and the defendant appearing by C. H. Wilson, Esq., its attorney.

A jury was thereupon impaneled and sworn to try the case and the following proceedings were had and testimony taken:

**[Proceedings Had on May 15, 1912, While Jury was
Being Impaneled, etc.]**

That on May 15th, 1912, and while said jury was being impaneled, and in the presence of the other jurors, during the examination of N. S. Arnold, a talesman, on his *voir dire*, by William M. Cannon, Esq., attorney for plaintiff, who subsequently sat as

a juror in this cause, the following proceedings were had: [61]

N. S. ARNOLD (on his examination as to his qualification as a juror):

Q. Have you any connection either as a stockholder or otherwise with an indemnity company, or organization for the purpose of insuring people against personal injuries?

Mr. WILSON.—I object to that question as immaterial.

Mr. CANNON.— I do not think it is immaterial. I would like to state why I asked the question.

The COURT.—What is the reason?

Mr. CANNON.—The reason is—

Mr. WILSON.—I object to the reason being stated.

The COURT.—I am asking for it.

Mr. CANNON.—In this case there is certain indemnity insurance against this kind of accident, and the insurance company is defending, through its own counsel, this action; therefore, I have a right to inquire—

Mr. WILSON.—I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

The COURT.—I will develop what the fact is; I will instruct the jury that they pay no attention to anything of that kind. I am bound to know the theory on which the question is asked, when it is objected to, especially. That is why I asked the reason.

Mr. WILSON.—We insist on the error.

The COURT.—You have your right to reserve your

exception. I overrule your objection.

Which ruling defendant now assigns as

ERROR NO. 1. [62]

[Motion That Jury be Discharged, etc.]

Mr. WILSON.—We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT.—The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact.

Which ruling defendant now assigns as

ERROR NO. 2.

Mr. CANNON.—Q. Have you any connection, either as a stockholder, or otherwise, with any indemnity company such as I have described?

Mr. WILSON.—We insist upon our objection.

The COURT.—I overrule the objection.

Mr. WILSON.—I will take an exception.

The COURT.—They have a right to inquire into facts of that kind. It might affect a juror's fairness, and it might turn out that some of them were stockholders in some such company.

Mr. WILSON.—The Supreme Court of this State has decided otherwise.

The COURT.—The objection is overruled.

Which ruling defendant now assigns as

ERROR NO. 3.

That the jury, being impaneled and sworn to try the case, the following proceedings were had, and testimony taken:

**[Motion that Plaintiff Elect Between Two Causes
of Action, etc.]**

Mr. WILSON.—If your Honor please, before the opening statement in this case is made, I desire to make a motion that the plaintiff at this time now elect between the two causes of action set forth in the complaint. The complaint, in the fourth paragraph, reads as follows: [63]

“That the defendant failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for plaintiff to perform his said labor aforesaid; and failed and neglected to provide a careful and competent man, and had in their employ at that time a man known to the defendant to be unreliable and careless, whose express duty it was to locate, mark and report to the on-coming shift unexploded charges of powder.”

Your Honor will observe that those two causes of action are stated in one count in the complaint; that the failure to furnish a safe place in which to work, and the failure to furnish a competent coemployee, each is a separate cause of action; the violation of each one or either of those duties would give to the plaintiff a cause of action and they each are separate delicts.

The COURT.—The motion will be denied. I will not permit it to go in as a double cause of action, Mr. Wilson; I understand the theory of the complaint,

and I shall instruct the jury that they can have but one recovery.

Which ruling defendant now assigns as

ERROR NO. 4.

[Motion That Plaintiff be Restricted in His Proof to Particular Cause of Action, etc.]

Mr. WILSON.—We make the further motion, if your Honor please, that in this case the plaintiff be restricted in his proof to the particular cause of action stated in this complaint, to wit, that the injury here complained of was proximately caused by the negligence of the defendant in failing to provide a careful and competent man known as a missed-hole man or a missed-shot man.

The COURT.—I will deny your motion formally at this time, but I will restrict the evidence within the lines that are deemed to be competent and proper when it comes to it. **[64]**

Mr. WILSON.—With your Honor's permission we will take our exceptions.

Which ruling defendant now assigns as

ERROR NO. 5.

[Testimony of Lawrence Whitsett, for Plaintiff.]

To support the issues on his part to be maintained, the plaintiff thereupon called as a witness LAWRENCE WHITSETT, who, on being duly sworn, testified as follows:

I reside in Glendale, Oregon, and am a brother of Fred Whitsett, and Frank Whitsett, now deceased. My father, James Whitsett, and my mother, Susie Whitsett, are now living in Glendale. My brother,

(Testimony of Lawrence Whitsett.)

Ed Whitsett, is living. On March 9, 1909, at the time of the happening of the accident and injury complained of, I was working in the mine close to the place of the accident between what is called 3 and 4. I had worked in the mine a little over 3 months. 3 is a drift running towards 4. While there I worked only in 3 and 1. 3 and 4 at the time of the accident had come together, thus forming one continuous tunnel. Mr. Bishop was superintendent and Mr. Grenager was day foreman and did day work. B. Hall was night foreman. Myers was night shift boss. Myers and B. Hall took night shifts. I know Nat Yokum. To my knowledge Nat Yokum worked in the mine 3 months before the accident and was a missed-hole man. A missed shot is a shot that does not go off with a round of holes. A round of holes are those drilled before a shot in the top, center and bottom of a face and are about 10 in number drilled from 4 to 5 feet in depth and are driven ahead in the face. The top holes drive straight in, and the rest of the holes point straight down, giving them a chance to [65] break the rock out. The night foreman, B. Hall, directed the driving of holes. The holes were driven with a Burleigh drill machine worked by 2 men each, a machine-man and a chuck-tender. The machine-man would crank and point the drill and the chuck-tender would put water in the hole and change the drill. In the course of their work they would sometimes change places. It was the duty of Yokum to find and fire missed holes. I have worked in mines about ten

(Testimony of Lawrence Whitsett.)

years. During the three months prior to the accident that I worked for defendant I was night machinery repairer for about a month. After that I was a machine-man, running a drill. Where there remains an unexploded blast or what is called a missed-hole, it is dangerous to drill another hole in the vicinity, or to drive into it. The danger is that an explosion most generally happens. On the evening of the accident I went to work about eight o'clock and in about two and a half hours the accident took place. I was about sixty feet away from where my brothers were working, back towards the mouth of the main tunnel. I could see the point where they were working. When I was up there earlier in the evening, I saw that the Burleigh drill was set for a lifter, that is, for boring a hole in a drift to take up the bottom and make it level. At that time my brothers were working. At the time of the accident I was back at the point of my own work. I heard a loud explosion. I went up there. I found Frank dead and Fred hurt pretty bad. I did nothing. I went on out of the mine and I did not see Fred until after they brought him out. I saw him at the mouth of the tunnel. At that time he was conscious a little while and then he was unconscious. He did not say anything to me. He was then taken to the hospital in a wagon. I went to the hospital the next day. I saw the wagon in which he was taken [66] but I do not know whether it was a dead-wagon or a spring-wagon. There was a cot in the wagon and he was on the cot.

(Testimony of Lawrence Whitsett.)

When I first saw my brother after he was taken out of the mine he was bleeding and black with smoke and dirt and his clothing was all torn up. The next day when I saw him at the hospital he was conscious. He remained there at the hospital about 4 months. I visited him frequently. For the first three weeks I remained there. I then went away and came back in a month or so and remained with him for about ten days. During the three weeks that I remained at the hospital he was at times conscious; at other times he was not. He appeared to be suffering pain and very frequently made outcries and moans. His arm and leg were bandaged up so that I could not see the extent of his injuries. Afterwards I saw my brother at Glendale when he got home. He was there in the train and was brought to the house in a rig and carried in. He was in bed for the three months that I remained there. He had the doctor and his mother looked after him. I then went away and came back at the end of about three months. He was then getting around on crutches a little. Before the accident my brother was strong and rugged. He was about 22 years of age and weighed about 160 pounds. He is not at all like that now.

Q. State what the manner and appearance of your brother at the present time is physically and mentally, as compared with his condition at and before the time of this accident.

Mr. WILSON.—I object to that upon the ground that it is incompetent, irrelevant and immaterial

(Testimony of Lawrence Whitsett.)

and calling for the opinion of the witness and no proper foundation laid.

The COURT.—The objection is overruled.

Mr. WILSON.—I take an exception. [67]

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 9.

Mr. CANNON.—Go on and state fully.

A. He does not seem to have the mind *had* had before the accident.

Mr. WILSON.—Let me move to strike out the answer as not responsive, and incompetent, no proper foundation laid for it.

The COURT.—I will overrule your motion.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 9a.

Since the accident my brother has worked around the home quite a lot, mostly helping my mother in the kitchen, but he has done no heavy labor of any kind. He does not seem to have much strength. I have observed a change in his condition.

Q. What change have you observed?

A. He does not seem to me to be the man he was physically or mentally.

Q. Can you describe it any more particularly than that? A. No, sir.

Prior to the accident I was acquainted with Mr. Hall, the night foreman.

Prior to the accident I discovered at several dif-

(Testimony of Lawrence Whitsett.)

ferent times missed shots in the place where I was working, and reported them to Mr. Hall. I should judge that I discovered four or five missed holes and reported them. Mr. Hall was my immediate superior. My work did not bring me in connection officially with the missed-hole man. I have seen the missed-hole man Yokum [68] under the influence of liquor and several times have seen him drunk while on duty. Yokum drank considerable. He was absent from work several times and when he returned he would be intoxicated. I told Mr. Hall that I had found missed holes at several different times around difference places where he had told me to set up. I did not say much to him about Yokum, nor did I mention to him anything about the condition that I had seen Yokum in at different times. During the night while Hall was on duty, he would be going around among the men seeing if they were working and telling them where to work. Yokum would be looking after missed holes and pulling down rock. They both covered the same territory. Our work was not at the same place every night. At the time of the accident my brother was receiving \$2.75 a day and working every day in the month. He paid his expenses out of that, 75¢ a day for board and \$1.50 a month for bunkhouse room; hospital fees \$1.00 per month, which included the privilege of 10 weeks in the hospital at Coram. Two shifts worked 8 hours each in the 24 hours. The night shift worked from 8 o'clock in the evening until 5 o'clock in the morning, with an hour off for

(Testimony of Lawrence Whitsett.)

lunch. When the shifts went off the blasts that were ready would be exploded and then the missed-hole man would make his examination and the miners would not commence drilling again until after his inspection. At the point of the accident they were starting to run a cross-cut from 3 to 4. (Witness is shown photograph.) That is a photograph of a machine and the point where they started to cross-cut and also of the place where the accident occurred. The photograph was taken the night before the accident. I recognized in the photograph Frank Whitsett, who is marked with the letter A, Fred Whitsett, who is marked with the letter B, B Hall, who is marked with the letter D and Enos Wall, who is marked with the letter E, and the Burleigh drill, being marked C. Between [69] the time when this photograph was taken and the time the accident occurred. I do not know that any work had been done at that place other than drilling the previous round of holes. The machine there is what is known as the Burleigh drill. It is run by air.

Mr. WILSON.—We will admit, if your Honor please, that this is photograph of the drift or cross-cut, whichever it may be, where the accident occurred, taken the night preceding the accident, and that it may be used for the purpose of illustration as a diagram, with such modification of conditions as may be shown, to have taken place after the taking of the photograph, as may be shown by the evidence.

(Testimony of Lawrence Whitsett.)

The work at the place of the accident was carried on by candle light. (The witness' attention is called to a diagram drawn on the blackboard.) The space between the two main lines up and down represents the tunnel, which has been called 3 and 4. The cross represents the place where the work was being done at the time of the accident. Below and to the left are two cross lines, the space between which is supposed to represent a cross-cut. It was at this point that I was working at the time of the accident and at that time Enos Wall was working at the place marked B. At those times when I called the attention of Mr. Hall to the missed holes, of which I have testified, he did not ask me to do anything with reference to them, but gave me another place to work. At the time of the accident and for about 10 years prior thereto my father had been in poor health, and he is in poor health at this time and unable to work. My mother is also very poorly.

Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally? [70]

Mr. WILSON.—I object to the question as irrelevant, incompetent and immaterial, not the proper proof of damages in the case, and calling for the conclusion of the witness.

Mr. CANNON.—I will modify the question. What was the financial condition of your parents at

(Testimony of Lawrence Whitsett.)

the time of the death of one brother and the injury to the other?

Mr WILSON.—The same objection.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 14.

A. They were very poor. My brother Frank had contributed to their support since he was big enough to work for wages. At the time of the accident he had been working underground as a miner for three years, and Fred for three months.

Cross-examination.

My mother and father live in the town of Glendale in a small house built on a lot owned by my brother. My father does not own any real property, nor does he have a bank account. He is 56 years old and my mother about 53. My brother Ed Whitsett is the oldest; he works as bridge carpenter and contributes to the support of my father and mother. Next comes Milton. He works in a block-signal gang on the railroad. Then I come. I was born in 1883 and have been mining for ten years and contribute to the support of my father and mother and always have done so since I have worked. After me there came Fred and Frank, twins. There is one living sister and one deceased. I worked in the defendant's mine three months prior to the accident, but [71] did not work afterwards. Frank and I began work there at the same time. Before that he had worked in Siskiyou County off and on for

(Testimony of Lawrence Whitsett.)

three or four years. In mining a drift runs along the course of the vein, and a cross-cut runs through or across the vein. The cross-cut at the place where the accident occurred had not progressed at all at the time of the accident; I mean that they had not taken out any rock there. I was at that place about an hour before the accident and Fred and Frank were there. I then went to work at the place marked 4, which is about 60 feet away. I was operating a drill at the time. I was slabbing off, that is, knocking down ore off the side of the drift. I stood in the drift most of the time but I was slabbing off the cross-cut. Enos Wall was working at the place 3. During the time that I worked on this shift I did not go to the place 2 on more than one occasion. I began work at the place 4 and worked there approximately an hour and a half and then went to the place 2 and was there probably 5 minutes. While I was there my two brothers Fred and Frank were there. I do not remember anyone else being there. I then returned to the place 4 and continued work up to the time of the explosion. After I returned to the place 4 neither of my brothers came to me, nor did I have any communication with Enos Wall. The distance between 3 and 4 is about 30 feet and 3 is about halfway between 4 and 2. The night of the accident was my first shift in this drift. While I had probably passed the point 2 before the accident, I had never had occasion to stop there until the time that I have testified to, when I was there about 5 minutes, an hour or so before the

(Testimony of Lawrence Whitsett.)

accident. When I was at the place 2 before the accident there were probably 8 or 9 top holes already drilled. It was the practice to drill about a dozen holes in [72] the face of the drift or cross-cut and then load them with powder, the number of holes depending somewhat on the size of the face or nature of the ground. The blast is exploded as the men go off the shift. The men work shifts of 8 hours with intervals of 3. In the intervals the powder smoke, caused by the explosions, would clear away. The explosion would cause the dirt and rock to fall down in large quantities. I have known Yokum about 5 years. Several times while I worked there I saw Yokum drunk at the entrance into the mine. The last time was about two weeks before the accident. He was then staggering around. I never noticed Yokum intoxicated when any of the superiors were around. There were probably about 100 men that went into the mine on each shift. The drill-men would work at 25 or 30 different faces in the mine on each shift. Some of these faces were a considerable distance away from others. Yokum was the only missed-hole man at the mine, so far as I know. While I worked there I saw Yokum go on shift intoxicated probably 4 or 5 times. He got his liquor at a little place about a mile away. My father has been ill with Bright's Disease about 10 years. My mother has been ill about 8 years. I do not know what is the matter with her. I do not know how much money my brother Ed contributed to the support of

(Testimony of Lawrence Whitsett.)

my father and mother. I contributed \$15.00 or \$20.00 a month.

Redirect Examination.

When the men gathered at the entrance of the mine preparatory to going on shift, the foreman was at the candle-house where all the men went to get candles. B. Hall directed the miners where to work. I was never told, while working in that mine, to examine for missed holes. A night bookkeeper there checked off the men as he gave out the candles.

[73]

Recross-examination.

We went by numbers. We had checks. We got our tag and presented that as we went on shift. We got the tags from a board alongside the candle-house and handed them to the bookkeeper, who was inside, and he gave out the candles.

[Testimony of Enos A. Wall, for Plaintiff.]

ENOS A. WALL, called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I reside at Medford, Oregon. At the time of the accident I was running a drill in defendant's mine. I knew the Whitsett brothers, also B. Hall and Yokum. I knew Mr. Grenegar, foreman, and Mr. Bishop, superintendent, of the mine. At the time of the accident I was working within 30 feet of Fred and Frank Whitsett, at the place marked on the diagram 3. They were working at 2; Lawrence Whitsett at 4. The machine at which Fred and Frank were working had been set up the night before.

(Testimony of Enos A. Wall.)

They were just starting a cross-cut. B. Hall assisted in setting up the machine. The photograph shows the point at which the cross-cut was commenced. The photograph is a flashlight taken the night before the accident. They drilled, I think, 5 holes the night before the accident. None of those were shot off that night, but the work of drilling was continued by the next shift. I saw the Whitsett boys working at 2 on the night of the accident. The only lights they had were candles. Between the time I went on shift and the happening of the accident, I went to get a drink, and coming back stopped to talk with the Whitsett boys. B. Hall was not there at that time. He was there at about half past eight and remained probably five minutes. I was running my machine when the explosion occurred. It put out the lights for one hundred feet around. I lit my candle as soon as I [74] got over there. I found Fred about 8 feet from my machine. That would be about 22 feet from where they were working. I did not find Frank, but I assisted in taking Fred out of the mine. I took him by the arm and helped him up until another fellow came and assisted me. We went out from No. 4 through No. 3 and used the skip at No. 3 and so down to the main tunnel and out of the mine. He was partially unconscious until we got him outside and kept saying, "You hurt my arm." When we got outside he kind of went away in a stupor. I put him on a cot in the bunkhouse, washed his face the best we could and bandaged it and got a wagon to

(Testimony of Enos A. Wall.)

take him to the hospital, which was about 5 miles away.

Q. What kind of a wagon did you take him in to the hospital?

Mr. WILSON.—I object to that as immaterial, no part of the *res gestae*, no element of damage in this case, and incompetent.

The COURT.—I overrule the objection.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 18.

A. It was a dead X wagon. I did not go with him to the hospital but walked down with his brother. I saw him the next morning. His head was bandaged all over. I stayed in town 7 days and saw him every day at the hospital. The first three days he hardly knew us. After that he seemed to gain consciousness a little, gained right along. After the seven days I went down every Saturday to see him until he commenced to get better. Then I would go once in two weeks. The last time I saw him was the 4th of July. [75] He was in bed then and they had removed the bandages from his head. I did not see him again for four months when I saw him in Medford. He then walked with a cane and was lame in one leg. At the times I called on him at the hospital he would moan once in a while and holler when he moved. I know Yokum. He was a missed-hole man. Before the accident Yokum quite often got under the influence of liquor. About ten days or two weeks prior to the accident I was look-

(Testimony of Enos A. Wall.)

ing for steel and I ran on him one evening when he was lying on a pile of muck asleep. Prior to the accident I probably saw him under the influence of liquor once a week.

Q. At any time that you saw him under the influence of liquor, where was the foreman, if you know?

A. He never stayed close to the foreman; he managed to be in another part of the mine all the time.

When the men were going into the mine at the beginning of a shift they would get their candles at the office from the bookkeeper. At such times the foreman would be there. Yokum would get his candles at the same time as the other men. I should judge that there were about 180 or 200 men on each shift. After a round of shots had been fired the drifts were cleaned out entirely and then subject to inspection by the missed-hole man. That would be done before a shift would go to work at that same place again. We had a clean place for the machine.

Cross-examination.

My work was at place 3, which was 30 feet away from the place 2 where the accident happened. The photograph was taken March 8th, the night before the accident. These men represented in the photograph, except Hall and myself, worked at that place [76] on the evening of March 8th. The machine was in the position indicated in the photograph when I went to the place 2 on the evening the photograph was taken. I did not see the day-shift working at 2 on the day preceding the accident, but from

(Testimony of Enos A. Wall.)

the holes that were there one would naturally think that work had been done there. There were about five more holes than there were when the Whitsett boys quit the morning before the accident. They usually drill 12 holes in the face of a cross-cut of that character before they load the dynamite. I saw Yokum under the influence of liquor about a week before the accident. He was lying on a muck pile in the mine. I guess it was about a week before that I also saw him under the influence of liquor at the bunkhouse. I saw him on several different occasions, but I did not keep a memorandum of the times.

Mr. CANNON.—Mr. Wilson, it is not disputed that Frank Whitsett was killed in this accident, is it? I have not shown his death absolutely.

Mr. WILSON.—No, that is not disputed. It is admitted.

The COURT.—I want to ask you one question. You spoke of an occasion when you saw Yokum sleeping on a muck pile; was or was not that during the working hours of his shift?

A. It was during working hours.

[Testimony of Ed Whitsett, for Plaintiff.]

ED WHITSETT, called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I am a brother of Fred and Frank Whitsett. At the time of the accident I was at Glendale and did not see my brother Fred until about June 20th. I then saw him at the hospital [77] in Coram. He

(Testimony of Ed Whitsett.)

was in bed. Afterwards he sat out on the porch with a nurse. He remained there until about the 8th of July. I remained at Coram until he left and was at the hospital every day and saw him wash his leg every day. They kept the leg open and washed it out every day and they scraped the bone right up and down to get off the broken bone. My brother suffered pain during all that time and on one occasion they put him under the influence of an anaesthetic. The bone was scraped for a distance of between 7 and 8 inches. About July 8th I took my brother home to Glendale where he was put to bed and had the attendance of a physician. I remained there about a week and then went to work. During the time that I was there he appeared to be suffering pain all the time. I went back home as often as I could, sometimes once a week and sometimes once a month. After about a couple of months my brother could get about with a pair of crutches, but it was close to a year before he could get about without either crutch. He then used a cane, but I do not know how long he used the cane. Before the accident he was strong and stout and weighed about 160 pounds. He now weighs about 130.

Q. What is the appearance of your brother Fred now as compared with his appearance before the accident.

A. Nothing at all; no comparison, whatever.

The COURT.—Q. How do you mean—do you mean that he appears so much better now, or worse?

A. Worse.

(Testimony of Ed Whitsett.)

Mr. CANNON.—Q. What appears to be his mental condition now with respect to memory and his mentality generally as compared with what he was before the accident? [78]

Mr. WILSON.—I object to that upon the ground that it is incompetent under the pleadings, irrelevant, and that there is nothing of that character alleged in the pleadings.

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 20.

A. Nothing at all. The mind isn't like it was before at all. My brother kept books for a man in Roseberg last summer and he is now working on the ranch raising chickens and a little garden. So far as I know, he has done no heavy work since the accident. Prior to his death my brother Frank contributed to the support of his father and mother.

Cross-examination.

I could not state exactly the date or time when I saw my brother Frank give any money to my father or to my mother. I have seen him the same as I have seen myself and all the rest of us pay the bills. When we got home we four boys went together and paid the grocery bills, the medicine and doctor bills and everything.

Q. Your mother has been ill for a long time, has she? A. She has for about eight years.

Q. What is the trouble with her?

A. Well, change of life for one thing.

(Testimony of Ed Whitsett.)

Q. And what else?

A. Other ailments; I could not say what. That has been the principal thing, so the doctor told me.

Q. You don't know except what the doctor told you? [79]

A. That is all I know about it.

Mr. WILSON.—I move to strike it out as hearsay.

The COURT—Let it stand.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 21.

My mother is about 54 years of age and my father about 56. My age is 33. I have contributed about \$20.00 a month to the support of my father and mother.

[Testimony of Fred Whitsett, for Plaintiff.]

FRED WHITSETT, being called as a witness on behalf of the plaintiff, on being duly sworn, testified as follows:

I am the plaintiff and a brother of Frank Whitsett, who was killed in an accident. I went to work for the defendant January 27th, 1909, and worked continuously up to the time of the accident. I was a machine-man's helper, working on the night shift. The boss of that shift was B. Hall. The foreman of the day shift was Grenegar. On the night before the accident a photograph was taken at the place where the accident happened. Before the photograph was taken I had not done any work at that particular point. The drift at that time had not been started. My brother Frank and B. Hall and

(Testimony of Fred Whitsett.)

myself set up the machine, as shown in the photograph, and it was in that place at the time of the explosion. Prior to the machine being set up and prior to the taking of the photograph I do not know whether any recent drilling had been done at that point. After the photograph was taken my brother and I went on drilling until half-past four in the morning, and I think we drilled five holes. We went to work again at that place on our next shift, which was at eight o'clock the following night. [80] B. Hall was there at the time and told us to go ahead and finish that round of holes and shoot the round when we went off in the morning. At that time there were two holes and part of another to drill, to finish the round. The drill was in the partly drilled hole and B. Hall told us to go ahead and finish that hole and we drilled in, I guess, 15 or 20 minutes and it exploded. At that time my brother was tending chuck and I was running the machine. I heard the report; that is about all I know. The next thing I remember was when the doctor came from Coram. I was in bed some place. I was conscious probably one-quarter of the trip from the mine to the hospital. After I reached the hospital I should say I was conscious about half of the time for the first six or seven weeks. During that time I do not know what the treatment was. After that time I noticed that my arm was stiff, my left leg was bent back and I could not straighten it for about two months and a half. I found this place here was fractured and right along here also (pointing) and there

(Testimony of Fred Whitsett.)

are scars all over my head. My hearing is not as good as before the accident. My arm was broken, but it is all right now. It was three or four months before I had any use of it and since the injury it has not been as strong as the left arm. Pieces of rock were shot into my head and the doctor had to get them out. They caused the scars. When I left the hospital I could not hardly do anything to help myself, nothing at all. I had to have somebody dress me and move me in the bed and out and pack my meals to me. After I went home it was seven or eight months before I was able to be out. It was in December before I got out on the porch by myself. I suffered a whole lot of pain while I was in the hospital and after I left the hospital. I always suffered when they dressed my leg. There is a large scar there now about 7 inches long. Pieces of rock were taken out of that wound and the bone was [81] affected, small pieces of bone came out of the wound for nearly two years after the accident. I cannot sleep very well nights at present. I have to sleep almost sitting up, because if I lie down in bed my head gets dizzy. I should judge that my left leg is now about half as strong as my right leg. If I walk too far it gives out on me. Once or twice since the accident I have attempted to do manual labor, but I could not make it. At the time of the accident I was receiving \$2.75 a day. My brother Frank was getting \$3.25. There is a large scar in my right arm just above the elbow where the break occurred. (Here the witness bared his body to the jury that

(Testimony of Fred Whitsett.)

they might see his various marks and scars.)

My brother Frank and I were twins. We were 22 years of age at the time of the accident. While I was in the hospital there were seven operations performed on me. There was one operation that occupied from 8 in the morning until 6 o'clock in the evening, removing the bones from my leg. During that time I was under an anaesthetic. The next longest operation was 3½ hours. My expenses at the hospital at Coram were \$248. The doctor's bill at home, I guess, was three or four hundred dollars. I paid \$1.00 a week, which was deducted from my wages and entitled me to receive ten weeks at the hospital at Coram.

Cross-examination.

The debt to the hospital of \$248.00 was incurred after the expiration of 10 weeks. I have never seen the bill of the doctor at Glendale. He did send one bill, which was about \$300. I worked for the defendant six weeks prior to the accident with my brother Frank operating the drill and tending chuck.

[82] The first work that we did at the place of the accident was on the evening the photograph was taken. I think we drilled five holes that night. After we came off shift the day shift went on and they continued the drilling, so that when we went on shift the night of the accident there were two holes and a part of the third yet to drill. Those were the lifters. In the meanwhile no blasts had taken place in this face. It was the custom of the mine to drill all the holes—a dozen ordinarily—and then load

(Testimony of Fred Whitsett.)

them with powder and set them off when the men went off shift. The purpose of that was, first, because they could not drill with holes loaded with safety; and second, to have the blasts go off at one time so that they would not interfere with work at other places. I do not know the appearance of a missed hole. I never saw one. I know that the purpose of putting the powder in is to blast the rock and I have assisted in loading the holes at various times; and a missed hole is a loaded hole that had not gone off; in other words, one in which the powder has not exploded. Where the blast or charge in a hole goes off, it breaks up the rock around the hole.

Q. And where a charge does not go off, it does not break up the rock? That is true, is it not?

A. I guess it is.

There were a great many faces in this mine, and we worked first one place, then another, drilling holes and loading the holes with explosives. I did not know that after the blasts were exploded a man came along with a bar and barred down the loose pieces of rock. I did not see him do that. I know that the muckers removed the pieces of rock that fell down on the ground. I did not see any mucking done at the place where the accident occurred. When we went to work there, there was a very small [83] amount of muck on the ground, probably about 4 inches in depth, scattered over the floor of the tunnel, but there was none against the face that I know of. I suppose that the mucker scraped it away. It was done when we got there.

(Testimony of Fred Whitsett.)

Q. How far back from the face was the muck straight back?

A. Probably halfway across the tunnel; it is hard to tell. By the tunnel I mean the depth and between that muck and the face, where we were working at 2, there was no muck, none near the face. The holes are ordinarily drilled 4 or 5 feet deep and 4 or 5 sticks of dynamite are placed in each hole. Sometimes they put just a little mud on top of them. There is a cap and from the cap a fuse runs, a separate fuse for each hole. When we go away after we have loaded the shots and lighted the fuses, the fuses are sticking out, one out of each hole. The length of the fuses differs, some of them are 5 or 6 feet long. On the evening of the accident we got to this face probably 10 minutes after 8, but we had to wait for steel and it was 10 o'clock when we got the drill working. When I first went to the place 2 I remained there probably 5 minutes, and during that time I looked at the holes that had been drilled by the day shift and I saw those that had been drilled by us. When we got to work there was a hole started but not completed. The holes are started with quite a large drill and drilled 7 or 8 inches and then a little smaller drill is used, and that is what we were waiting for. When they came I took four of them I think over to the place 2. They weighed about 25 pounds. At times I operated the drill. To do that I turned the crank or valve that let in the air, and also turned the crank that threw the [84] drill into the face of the hole. That was all that it

(Testimony of Fred Whitsett.)

was necessary to do in the drilling part. That does not require any great strength. When I worked as chuck-tender my duties were to take the drill out of the chuck whenever necessary and to put in another drill. The drill was tightened in the chuck with a monkey-wrench; and besides *was tightened in the chuck with a monkey-wrench; and besides* that, it was my duty to pour water into the hole while the drill was in operation. That work did not require any great strength.

Q. Did you observe there when you went to work that evening, either when you first went there about 8 o'clock, or the second time when you went there about 10 o'clock, a missed hole alongside of the one that you began drilling? A. No, sir.

Q. Did you see any drilled hole there?

A. I did not.

Q. About how high from the bottom of the drift was this hole, the lifter, that you were drilling?

A. I should say about 6 inches.

When I brought the steel I put a drill in the chuck. The mouth of the chuck was then about 6 inches above the ground. Before I put in the new drill I took out the old one. In order to do this I stooped over so that my head came within about a foot of the face and of the place where we were drilling. My face was then about 18 inches from the ground and I could see the face of the wall perfectly. When I went for the steel I left Frank at the machine and when I came back he was still there waiting for me. I knew Yokum and had seen him about the mine a

(Testimony of Fred Whitsett.)

few times. I was his duty to bar down and look for missed holes. I knew that missed holes sometimes occur. I had seen him barring down.

Q. You have seen a missed hole, of course? [85]

A. I don't remember whether I did or not.

Q. You don't know whether you ever did or not?

A. No, sir.

I never saw Yocum intoxicated.

Mr. CANNON.—We now offer in evidence, if your Honor please, the American Tables of Mortality to show the expectation of life of these plaintiffs.

Mr. WILSON.—I have an objection, if your Honor please: We object to the tables on the ground that under the facts shown in this case they are incompetent, irrelevant and immaterial, and that it is necessary for one relying on a mortality table to prove the life expectancy of a person to show that he belongs to the class of persons from which such tables are made.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 25.

Mr. CANNON.—The expectancy at the age of 22 is 40.85 years; the expectancy of life of the father, 56 years of age, is 16.72; and the expectancy of the mother at 54 is 18.09.

Mr. CANNON.—The plaintiff now rests.

[Motion to Strike Certain Testimony.]

Mr. WILSON.—Now, if your Honor please, we move to strike out all of the testimony in this case

as to the incompetency of the man Yokum. We move to strike out all of the testimony in this case as to his being intoxicated, or seen intoxicated.

[Motion for Order of Nonsuit.]

Mr. WILSON.—And in the Reardon case we move that an order of nonsuit be entered upon the ground that the plaintiff has failed to substantiate the allegations of negligence in this case. Further, upon the ground that the evidence fails to show [86] any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; and further, upon the ground that it does not appear from the evidence in this case that the defendant negligently or carelessly omitted or failed to furnish the deceased, Frank Whitsett, with a safe place in which to perform his work.

And in the Fred Whitsett case we make the further motion that an order of nonsuit be made and entered therein upon the ground, first, that the plaintiff has wholly failed and neglected to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; second, upon the ground that there is no evidence in this case that the missed-shot man or the man Yokum was habitually intoxicated, or that his services were rendered inefficient by reason of any intoxication upon his part, or that the defendant knew, or had reason to know of his habits of intoxication; nor is there any evidence to show that at the time of the accident and injury complained of, or immediately before that time, Yokum inspected the place where the accident occurred and

at that time was under the influence of liquor or inefficient in any way or manner, whatsoever; and on the third ground that there is no evidence in this case to show that by any act or omission on the part of the defendant the plaintiff was furnished with an unsafe place in which to work.

The COURT.—I will deny the motion to strike out the evidence indicated and likewise the motions for nonsuit.

To which rulings the defendant then and there excepted, and now assigns the same as

ERROR NO. 26, ERROR NO. 27. [87]

[Testimony of Ira L. Greninger, for Defendant.]

And thereupon the defendant, to maintain the issues herein on its part, called as a witness IRA L. GRENINGER, who, on being duly sworn, testified as follows:

I am an assistant chief engineer for a mining company and engaged in mining. I was employed by the defendant between two and three years and left them July 9th, 1911. I was foreman of the Balaklala Mine. I know Fred Whitsett and in his lifetime I knew Frank Whitsett. I employed them. I remember the accident in this case. I directed the Whitsett boys as to their work at the place of the accident. I remember the taking of the photograph. Prior to the time the photograph was taken there had been one round drilled and blasted in this cross-cut. It broke the cross-cut out from 3 to 3½ feet in depth. In the photograph the drill isn't pointed toward the cross-cut. The cross-cut appears behind Frank Whitsett in the photograph. At the time of

(Testimony of Ira L. Greninger.)

the accident he was running a machine. The duties of the machine-men were to set up their drills when going on shift, or ordered to do so, and drill holes according to the customary manner, and load them with powder and blast them. It was the duty of all machine-men to look for missed holes in order to protect themselves in cases where the missed-hole man was not for any reason able to find them, either being limited in time or from being covered with muck. I do not consider that it was the duty of chuck-tenders to blast missed holes, but it was the duty of each man in the mine to look for and avoid missed holes. A missed hole is one that has been filled with powder and failed to explode. At this place the appearance would be that of a round hole, very much the same as the end of a hole that had not been loaded at all. Such a missed hole would be readily seen, if it was above the muck. [88] If it was below the muck it would be harder to detect. In drilling lifters, the bottom holes in a drift, they are commenced a little above the level and extend quite a distance below the level of the drift in order to get the bottom of the drift on a level, and after the holes above have been once located and assurance made that they have been destroyed, it is not the practice to raise the muck in a depth as low as the bottom of the holes. We ascertain that the lifters have been exploded by testing the ground with a drill or piece of steel. With it we find that where a hole has been exploded the ground is broken and fractured, while if there has been no explosion,

(Testimony of Ira L. Greninger.)

the ground is hard.

Q. Who made such a test in this mine?

A. The bottom hole, the machine-men were doing that sort of work.

I have had experience in other mines; in the Blue Ledge Mine, Siskiyou County, California; in the Greenback, in Josephine County, Oregon, and Cherry Hill Mine, in Siskiyou County, California, and various others.

Q. Is there, or is there not, a custom among miners and drill men as to looking for missed shots?

A. There certainly is a custom for the protection of the miners themselves for them to look out for missed holes.

There were approximately 50 machine-men employed at this mine at the time of the accident and they were engaged in drilling about 25 different faces. In the mine I should say that there were altogether 50 or more faces. The blasting was done at the time the shift left the mine on account of the fumes of the powder making it impossible for the men to stay in the mine after the shots were discharged. If a machine-man discovered a missed hole, he was either moved to some other point for the [89] time being, or the machine was taken down and the hole blasted, depending on the local circumstances. It would be impossible to say how long before the Whitsett brothers went to work on this face that the other blast had been made. It was the duty of the muckers or laborers to remove the muck or broken rock after a blast. They usually

(Testimony of Ira L. Greninger.)

did this the next shift after the blast. I knew and employed Yokum. During the time that he was employed there I never saw him intoxicated, nor had any complaint ever been made to me about his being intoxicated. I have no distinct recollection of giving any instruction to either Frank or Fred Whitsett relative to their duty to look out for unexploded holes.

Q. Did you ordinarily on employing men give such instructions?

A. I did so instruct them and I always instructed my shift bosses working under me to call their attention to those things.

Cross-examination.

The drift from which the cross-cut 2 was being driven had been cut through for a month or a month and a half prior to the accident. In my capacity as foreman I was supposed to go to every part of the mine. It was my custom to, several times during the day, and I became familiar with every part of the mine. That is the reason that I can identify the photograph to my own satisfaction. I do not know how long before the accident the previous shots had been exploded at that particular place, from the fact, as I have stated before, the machine was moved from one point to another, and sometimes the face would be left with no one working in it from one to two or three days. In this case I do not know how long it was before the last round was [90] finished or exploded. Yokum's duties were to look for missed

(Testimony of Ira L. Greninger.)

holes and to bar down loose pieces of rock and to explode missed holes when he found them. B. Hall had charge of the underground work at night under my direction. After a round of shots were exploded on any particular face, the workmen would be removed to another face on the next shift, and the muckers would get to work cleaning away the muck from the place where the explosion had taken place.

Q. At what point of time would Mr. Yokum go around to examine for missed holes after the muckers had cleared away the muck?

A. It would depend on circumstances. He was supposed to be looking for the holes from the time he went on shift, when perhaps no muck had been cleared away, from noon time until evening.

Yokum had an eight-hour shift and was supposed to be looking for missed holes and barring down rock and firing missed holes all the time. We blasted every day shift somewhere. There were about eight or ten rounds at a shift. There was a missed-hole man for each shift. The operation of clearing the muck from any one place required a shift and sometimes more than a shift, so that a round of holes blasted at the end of one shift might not be cleared away by the end of the following shift. Sometimes the muck might remain in its place over a shift. The best time to examine the face was after the muck had been removed, but the exigencies of mining sometimes required the missed-hole man to examine the face before all the muck had been removed. If the missed-hole man found a face

(Testimony of Ira L. Greninger.)

clear in the course of his day's work and it was his part of the mine to look after, he examined [91] the face for the missed holes. If it happened that the face had muck in it, he would examine as far down as possible at that time and go on to the next place. Sometimes the drillers would be set to work at a face before the muck had been entirely cleared out. As a matter of fact, there would be no danger of hitting a missed hole in the upper part, which was always uncovered and plain to be seen, so that the missed hole would be detected without any trouble. The machine was moved down in the lower holes after the muck had been taken out. Sometimes the muck would lie halfway up. If the missed-hole man came to a place where the muck had not been entirely removed, it would be his duty to make an examination as far as possible. That would leave the bottom of it unexamined. As to whether or not the missed-hole man would go back after the muck was removed to further examine the same face, would depend on whether he was ordered to do so, or had time to cover those grounds. If he did not have time, it was the duty of the machine-men to make the examination. The machine-men were supposed to take that precaution for their own protection. It was his duty to examine the whole face every time he went to work.

Q. Then what was the object of having a missed-hole man?

A. It was this: We had in this mine many men employed as muckers, not acquainted with powder and

(Testimony of Ira L. Greninger.)

would not know it if they saw it. These bar men and missed-hole men were employed by me for the purpose of protecting those men and also leaving the upper part of the face clean, so that a machine could be set up when a machine had finished somewhere else.

My idea in employing the missed-hole men was to protect the inexperienced men. We did not have any written or printed rules or regulations of any character at that time. *There were* [92]

Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the mine in the underground working of that mine?

Mr. WILSON.—I object to that question as immaterial and not cross-examination.

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 29.

A. There were no rules in regard to the working of the mine, the underground working, except as I have stated, the ones that I laid down.

The rules that I laid down were by verbal instructions to my shift bosses and to the men themselves.

Q. To what shift boss did you ever give any instructions or direction that the missed-hole man was only hired for protection to inexperienced men?

Mr. WILSON.—We object to that on the ground that it is not in itself an instruction, and it is incompetent, irrelevant and immaterial, and not cross-

(Testimony of Ira L. Greninger.)

examination. The witness has stated what were the duties of the missed-hole man, and it is entirely immaterial whether this witness communicated those duties to anyone else or not.

The COURT.—The objection is overruled.

To which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 30.

A. My giving instructions to three or four hundred men at the same time, having that many under me, I cannot call to mind any one instance or any instance by itself. [93]

I do not remember having communicated the exact words to any shift boss, but it was tacitly understood between us. I mean by that, such men as were employed as shift bosses understood it would be folly to employ a man to protect another person who did not know any more about the business than he did, and the machine-man was supposed to know how to handle powder, load holes and look out for his own protection, and it would be folly to hire a man of the same kind to look after it. We worked together with those ideas in my mind and no friction, so I assume they worked according to my ideas on those matters. I have no distinct recollection of ever communicating those rules to a shift boss at any certain time.

Q. You are assuming that the shift boss knew that? Knew what you had in your mind without your stating it to him?

A. I am assuming that we worked together to

(Testimony of Ira L. Greninger.)

that end and understood each other.

I never saw Yokum drunk or under the influence of liquor. I have no recollection of having asked Mr. Hall to discharge him because of his drinking proclivities. I knew that Yokum had the reputation of being a drinker when he was in town. It had not been communicated to me by Hall that Yokum had been hiding away from his shift boss when he was in the mine. I did not request Hall to get rid of him.

Redirect Examination.

I communicated my rules to my bosses verbally. As to the men, I often told them when I hired them what they should do, and also instructed the shift bosses to tell them. The shift bosses, in undertaking the position, knew their instructions, because when they were hired they were instructed what their duties should [94] be. We had no more missed holes in that mine than they do in others. I would say one per cent of the holes might have missed; that is an approximation. There are several causes for a hole to miss. One is, the removal or jerking out of the fuses from one hole by the discharge of another; by the rock flying from the first hole and pulling the fuse out of the second. It might be through a defective fuse or a defective cap or primer, or it might happen by the hole being wet and the primer or fuse becoming damp before discharge, and so not exploding. So far as Yokum is concerned, what I heard about his drinking was at the town Coram, about $4\frac{1}{2}$ miles from the mine.

[Testimony of John M. Williamson, for Defendant.]

JOHN M. WILLIAMSON, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a physician and surgeon.

Mr. CANNON.—We will admit Dr. Williamson's qualifications.

On Friday last I made a physical examination of Fred Whitsett. I found that he had sustained at one time or another a personal injury and that certain scars on his leg had resulted.

Q. With reference to the leg that you examined, state whether or not, in your opinion, the plaintiff, Fred Whitsett, has a good functional use of that leg?

A. I would consider that that leg is in condition for good functional use. With the exception of a scar on the under side showing a considerable amount of suppression, the condition of the leg, as far as development is concerned, is, in my opinion, satisfactory. There does not appear to be any muscular atrophy, and the various movements of the leg that he made in my presence were normal. I refer to contraction and extension. He complained [95] of his hearing. I held a watch about three inches from each ear and he claimed he could not hear it. His statement that he could not hear is what is called a subjective symptom; that is, a symptom which is claimed by the patient and which the observer has to accept or refute. In speaking with him, I spoke in an ordinary tone and I did not observe any great impairment of hearing, or any

(Testimony of John M. Williamson.)

impairment at all, as far as ability to listen to conversation is concerned.

Mr. CANNON.—We do not claim any great impairment of hearing, Mr. Wilson. We claim that it is impaired to some extent.

I did not find any impairment of his mentality. He answered my questions very intelligently.

Q. Did you or did you not discover anything in the physical condition of Fred Whitsett that would interfere with his ability to labor at the present time?

A. No. In my opinion the man is able to perform such labor at the present time.

The ability of a man to do work depends upon his general physical condition. I observed the general physical condition of Fred Whitsett when I examined him, although I did not examine the functional action of the heart, nor the condition of his liver or kidneys. I did not find in the examination of Fred Whitsett anything that would interfere or prevent his doing the work of the operator of a Burleigh drill in a mine. In my opinion, the man would be capable of operating such a drill. I think he could also work as chuck-tender at such a drill.

Q. Doctor, what is the nature of Bright's Disease, and what is the full effect of that disease upon the duration of life?

A. The term Bright's Disease is a conditional one. [96] It was formerly used to designate a condition that was marked by the presence of albumin in the urine. Now, there are several conditions of the

(Testimony of John M. Williamson.)

kidney that might give rise to albuminuria, as we call it. The condition may be acute or it may be chronic. It may involve the blood vessels of the kidney, and in fact the blood vessels of the entire physical system. It would come under the old classification of Bright's Disease. On the other hand, it might only involve the tubules, the secreting portion of the kidney, which is instrumental in separating that portion of the blood which passes out through the urinary tract as urine, or it may be due to a diseased condition of the connective tissue which adjoin the blood vessels and tubules. Any one of those terms could be put under Bright's Disease. I infer from what you tell me that this patient probably has a chronic condition of the tubules of the kidney, what we call a chronic neuphritis, meaning an inflammation of the kidney. A chronic neuphritis may drag along for quite a period, but a man subject to it is certainly a bad risk. He would not be considered or accepted by any life insurance company. If, in addition, a man has a degenerated condition of the blood vessels of the kidney, that would imply a degenerated condition of all the arteries, and he is on the edge of dissolution, we might say, at any time, because he could have a hemorrhage of the brain. That is quite a common termination of what is known as Bright's Disease. The term Bright's Disease has come to be employed in a popular way to designate almost any disease of the kidneys.

Q. What, in your opinion, would be the tendency

(Testimony of John M. Williamson.)

on the period of life of a woman 54 years of age who had for eight years been suffering from a change of life and other things, one-half the time or thereabouts bed-ridden? [97]

A. If she was bed-ridden half the time, I should consider that her physical condition was not good.

Cross-examination.

The change of life in a woman is considered to a certain extent a critical time. There is a remote possibility that she might die as a result of conditions arising during that period. After she passes that time, very frequently she regains her health and lives to a good old age. During the time there are mental conditions that are sometimes very serious. From the fact alone that a change of life is taking place, a physician could not determine whether the length of a woman's life would be shortened or otherwise.

The fact that Bright's Disease had existed for ten years would indicate a chronic condition. An acute attack of Bright's Disease is one that might either have a fatal termination or a recovery might take place within a very short time, or it might turn into a chronic condition. When the disease has become chronic a physician may in some cases approximate how long the patient will live. I do not, however, consider the mere statement that a patient has Bright's Disease, and has been suffering from it for 10 years, sufficient data upon which to draw any conclusion as to the duration of a patient's life.

(Testimony of John M. Williamson.)

I never operated a Burleigh drill in a mine. I examined Fred Whitsett's head during the examination that I made, and found a number of small scars and powder marks.

Q. Did you find one of the scars, the principal scar in his head, still soft?

A. Well, I would not say it was soft. I found a slight linear depression underneath the scar. [98]

I consider the bone in good condition at the present time.

Q. You don't know, do you, you are not in a position to say from the examination which you made, as to whether there is or may be any sort of pressure or any improper condition resulting from that on the brain?

A. It is a matter of a little more than three years since the accident, I understand.

Q. About that.

A. I would consider that the chances for anything in the future occurring would be very remote.

If a piece of bone worked out of that scar within the last year, I do not consider that would have any effect on that portion of the head underneath the scar. I examined the plaintiff's right arm. I could not say that I found any weakness, but I found the muscles on that side to be not quite up to the par as compared with the other side. The muscles were flabby to a certain extent. I found that the bone differed somewhat in contour above the right elbow, but he had enough muscular tissue to mask, to a great extent, the character of the thick-

(Testimony of John M. Williamson.)

ening; to the best of my judgment the bone was fractured above the elbow, but has made a very good repair and in good line. As the matter stands at the present time the muscles on the right arm are not as well developed as those on the left. It is, however, just as good an arm as many a man has that is going around with perfect health, with a normal arm which he is not using in physical work. It is not an arm that would enable him to perform the maximum amount of labor. With respect to the plaintiff's leg, I found a very deep depression on the inner side of the thigh, indicating that there had been a deep wound there, which involved to some extent the tearing of the muscles. The leg was slightly smaller [99] than the other, half an inch in circumference. In my opinion, that leg would be capable of sustaining exertion on account of the position of the scar. That would indicate that the injury had been received mainly between the two planes of muscles which, respectively, one upon the front and the other upon the back of the thigh. There did not seem to be any impairment of the group of muscles in front and very little of those on the back. I would not consider that the fact that the bone had been scraped for quite a period would weaken the leg, because nature very frequently rebuilds bone that is lost in that manner, and the bone might be just as strong, and even more bulky, than it was before the accident. The tendency, of course, would depend entirely upon the amount of bone lost and the amount of repairs that

(Testimony of John M. Williamson.)

had taken place, that is, of compensatory repairs.

Q. Now, in the case of a person strong and rugged, sustaining such an accident as you have heard described, and the effect of which you have seen to some extent, who has never since that accident regained his weight by 30 pounds, and complains of weakness and exhaustion, and inability to lie in bed, compelled to sit up at night, to sit up in bed the night, propped up on his pillow, that is a constant condition, if he lies in bed subjected to attacks which almost blind him, confusing sounds in his head, and such things, in a case of that kind, the natural processes of repair, would they be interfered with or hampered to any extent by that condition?

A. Well, you have carried that into the realm of subjective symptoms.

Q. Well, assume that these subjective symptoms exist?

A. I do not consider that they would interfere with the repair of the bone. [100]

If all these subjective symptoms that you have stated are admitted as existing, I would not call the man in healthy condition. Assuming that those conditions exist, I would not call him a sound man.

Redirect Examination.

From my own examination of the plaintiff in this case I would call him at the present time in fairly sound condition. It is my opinion that in his case the tendency would be toward further improvement in his health. In my opinion the reason

(Testimony of John M. Williamson.)

why the muscles of the plaintiff's arm are flabby and in not as good condition as the other arm is that they lack use. If they were used, there would be a gradual enlargement, restoration of the muscles to normal capacity and normal bulk and improvement in strength. It is a common thing for broken bone to work out in the process of healing. It indicates that the bone, which has been devitalized, is passed off by natural processes.

Recross-examination.

The coming out of the bone would not indicate a prospective necrosis or deadening of the bone. It might indicate a necrosis, and it is the method of nature when bone becomes necrosed to throw out a healthy barrier or layer around it, and, as it were, pry it off from it. Then again, on the other hand, the piece of bone might be detached entirely from the main bone at the time of the injury. It would simply lie in the tissue and act as a foreign body and the natural tendency is for foreign bodies to travel in the line of least resistance and work out. My opinion as to the condition of Mr. Whitsett is based upon the objective symptoms alone that I found. [101]

[Testimony of Christa B. Hall, for Defendant.]

CHRISTA B. HALL, called as a witness on behalf of the defendant, on being duly sworn testified as follows:

I am the man who has been mentioned as B. Hall, and was employed by the defendant as night shift

(Testimony of Christa B. Hall.)

boss at the time of the accident. I am familiar with the place where the accident occurred. I know Fred Whitsett and I knew Frank in his lifetime. I do not know whether the Whitsett boys or the day shift set up the machine. I do not remember that I assisted in setting it up. I know Yokum. I saw the place where the accident happened probably an hour before its occurrence. I did not at that time, or any time, tell the Whitsett boys, or either of them, to beginning drilling in a hole that had been partly drilled, and I did not at that time see a missed hole in the face of that drift, or about there anywhere. I had never seen Yokum intoxicated while at work, or in the mine, nor had I ever seen him intoxicated while I was at the candle-house and the men were getting their checks and candles. At no time was there any complaint made to me about Yokum's being incompetent through drinking, nor any complaint made at all. I did not at any time ask Mr. Grenegar to discharge Yokum, and I did not ask Grenegar, or any other person, to discharge Yokum because he was intoxicated while on duty. I had the right to discharge anybody under me in my shift, including Yokum.

Cross-examination.

Grenegar never asked me to discharge Yokum, or say anything about discharging him, nor did he ever say anything about Yokum's drinking, or that he was not a good man, and that I should discharge him. [102]

Q. Did you not say to Mr. Grenegar that you did

(Testimony of Christa B. Hall.)

not want to discharge him because they would give you an Italian, or someone who could not speak English, and you would have to go with him from place to place in the mine and show him what to do, and that would make you back-track on your work; did you not say that? A. Not to Mr. Grenegar.

Q. To whom, if anybody, did you say that?

A. I could not place. I don't know whether I said it or not. I did not say it to Mr. Bishop. I took no orders from him. I do not remember to have stated to Lawrence Whitsett or Enos Wall, since this trial began and here in San Francisco, that they wanted me to discharge Yokum because of his drinking habits and that I did not want to discharge him because they would give me an Italian or someone who could not speak English, and I would have to go with the Italian and show him the things that he had to do, and he would make me back-track on my work. I had heard of Yokum drinking and I saw him once drinking a little on the mine premises.

Q. Was he under the influence of liquor at that time? A. You would tell he was drinking.

I did not know that he was in the habit of hiding away from me in the mine or on shift. When I was at the place where the accident occurred, about an hour before the accident, Fred was there. Some time between 8 and 10 o'clock on that evening I took him to another part of tunnel No. 4 to show him where to set up when he had finished the other two holes and a part of another that was left to be

(Testimony of Christa B. Hall.)

done at the place where the accident occurred. On the evening of the accident I did not put the [103] Whitsett boys to work at the place 2. I came along there afterwards. I did not look to see what was done there. They knew what to do. I made no examination of the face there at all. I did not see Yokum around there that evening, although he was in that neighborhood the night before. I do not know how long prior to the accident he was in that part of the mine. There was a shift boss under me by the name of Meyers.

Redirect Examination.

Q. You say that you heard of Yokum drinking. What time did you hear of his drinking?

A. He was downtown and I heard he was full. That is all I heard.

He was at Kennett, 10 miles away. I stated that I had seen him drinking at the mine on one occasion; that was at the bunkhouse and before the accident. I don't know whether it was a month or six weeks or 10 days before. That is the only occasion that I ever saw him drinking or under the influence of liquor.

Recross-examination.

Yokum was not there long after the accident, maybe two weeks. The mine was shut down about five weeks after the accident. After the accident Mr. Grenegar ordered me to put Yokum on the other shift. [104]

[Testimony of John H. Meyers, for Defendant.]

JOHN H. MEYERS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a miner and have been for 22 years. I am acquainted with the defendant's mine and was employed there as shift boss on the night shift at the time of the accident. I worked with Mr. Hall. I would go to one end of the mine and begin and Mr. Hall began at the other and we would work toward each other until we met, placing the men and setting up the machines and showing the muckers where to work. I know Fred Whitsett and in his lifetime, Frank. I am acquainted with the place where the accident happened. I was there some time every night. I directed that the machine be set up there. Just one round had been taken out of that cross-cut. The muck was pretty well cleaned up. There was nothing to interfere with their setting up. I could see the face tolerably well. I did not examine carefully, just walked up and looked it over. I could see no reason why they should not set up there. I did not discover a missed shot. The drills are of different diameters according to the length. The hole is started at something like three inches and drilled a foot or a foot and a half. Then a second drill of smaller diameter is used and another foot and a half drilled, and then a still smaller drill. After a hole is drilled it is readily seen. It is very plain in the face of the drift

(Testimony of John H. Meyers.)

or cross-cut. After a round of holes are drilled they are loaded with dynamite, which is tamped in with a stick, and each charge is then connected with a cap and fuse. The fuses are cut at such length as will make the holes go off in rotation. After the shooting the muckers go in and clean it out. There was a little loose muck lying around the bottom, but [105] nothing to interfere with the process of setting up the machine. Where a missed shot appears, its appearance depends a good deal on where it is, whether it is in the center or the outside. A missed hole on the outside would leave a bunch of ground, which would indicate that the hole had not broken it. It would leave a mound of material unblasted, not broken, and it could be seen the moment you walked in. It would be possible for the rock to so break that it would conceal a missed shot, and that is the way they come at times to miss discovering them, because they are concealed. I knew Yokum. His principal duties were to bar down loose ground for the muckers, and, if he saw any missed holes, to shoot them, or see that they were shot. It was not his duty to remove the muck.

Q. What was the duty of the machine-men with reference to discovering missed holes?

A. The machine-men—I don't know that you would call it a duty. Of course, we did all we could about missed holes and things like that.

The custom there was the same as in any other mine. Machine-men are naturally always on the lookout for missed holes.

(Testimony of John H. Meyers.)

Q. I want to know, is it or is it not the custom in mining for machine-men to look out for missed holes?

A. Every place where I worked they did.

And they did in this mine. Some chuck-tenders looked for missed holes and some did not. That is a thing that is so thoroughly understood among miners that there is no such thing as duty attached to it, and no such thing as instructing them concerning it. Independently of instructions, most all of the drill men and chuck-tenders looked for missed holes. I knew Yokum. I had [106] never seen him at or near the mine under the influence of liquor, nor did I ever see him on his work in that condition. No complaint was ever made to me about Yokum. When I told the Whitsett boys to set up their machine at this place, I did not see a missed hole in this face, nothing to make me suspicious of anything like that. When a missed shot is discovered it is usually fired. Sometimes, if there is only just a little powder left in the hole, they take a stick and pick it out. We used a gelatine powder in that mine, which comes in sticks. It needs a hard concussion to explode it. I have no positive knowledge that Yokum inspected the face of this cross-cut before the accident. I looked at the face when I set these men up there and saw nothing.

Cross-examination.

I directed the Whitsett boys to go to work at this point the night before the accident. I knew that a

(Testimony of John H. Meyers.)

cross-cut had been ordered at this particular place by Mr. Grenegar, so that the men were set to work at that place really indirectly under the orders of Grenegar. All my orders came from him. There has been one round fired there a shift or two before I set the Whitsett boys at work at that place. I do not know who blasted that round. I remember a man by the name of Piper did some drilling on that first round. On the night of the accident I was at that place shortly after the shift started. I saw the drill was in position, but whether they were drilling or not, I do not remember. When a machine had been set up in a face of a particular cross-cut, that machine was used by the succeeding shifts until the holes were ready to be fired. It was then taken away to a safe place. After the shots were fired and the [107] muck had been cleared away the machine would be taken back and set up again for a new round (On being shown photograph.) I know for a positive fact that this photograph was taken as that bar set there in that cross-cut, but I could not tell by the photograph the direction in which the main drift proceeded. I am not an expert on photographs. I could not say how long I had been employed in the mine at the time of the accident. I was there only six weeks altogether. Yokum was there all that time. His duties were to bar down rock and to examine for missed holes and shoot them, and if he had any extra time he would do other work. When I went to the point of the accident on the evening of the accident the muck

(Testimony of John H. Meyers.)

was pretty well cleared away. At the time of the accident I heard a shot as I was going down the man-way. I knew there was an accident because nobody shot there between times when the men on shift were still around. I went there. The smoke was still pretty thick. We carried one of them out and had to get a stretcher to carry the other one. I looked at the place where the blast had gone off. It was at the same cross-cut at which I had set the Whitsett boys at work the night before.

Redirect Examination.

After the Whitsett boys had worked at this cross-cut to the end of their shift on the first night, they were followed by the day shift. That shift worked there all day.

[Testimony of C. F. Yokum, for Defendant.]

C. F. YOKUM, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I reside at Butte, Montana, and am a miner by occupation [108] and have been for the past 20 years. I was employed by the defendant at the time of the accident and knew Frank and Fred Whitsett. I was hired to bar down, and a day or two later the shifter gave me orders to look out for missed holes and shoot them when I could, otherwise have the machine-man when I could not. I had nothing to do with the muck that accumulated on the floor of the mine or drift or cross-cut after a blast. All I had to do was to examine as far down

(Testimony of C. F. Yokum.)

as I could and go along about my other duties, whatever they might be. Prior to the accident I examined the face of this cross-cut as far as I could.

Q. You say you examined it as far as you could. Was there anything there to prevent a complete examination?

A. Well, there was a little muck that the lifters had thrown up, and, of course, I could not examine this closely without mucking it out, and, therefore, I never stopped to do it.

Q. Was it or was it not your duty to muck out at that place?

A. No. This examination was before the night shift came on to bore the second round of holes in that cross-cut. The drill was not yet set up. I did not find any missed holes there.

Q. At the time that you made that examination that you have spoken of, were you sober or intoxicated? A. I was supposed to be sober.

Q. Were you sober?

A. Yes. At no time while I was employed at this mine did I go on work intoxicated. Off shift I have had several drinks with the boys around and felt pretty good at times, but not going to work. I never went to work intoxicated or under the influence of liquor and cannot remember to have ever gone into the mine while under the influence of liquor. I never at any time gathered with [109] the men at the candle-house in an intoxicated condition, or in a condition where I was under the influence of liquor, and I never at any time while under

(Testimony of C. F. Yokum.)

the influence of liquor went to sleep on a muck pile in the mine.

Q. I will read you part of the testimony of Mr. Lawrence Whitsett.

“Now, you have spoken about Mr. Yokum. How long have you known Mr. Yokum?”

“A I should judge about five years.

“Q. You say that on several times during the time that you worked at this mine you saw him drunk? A. Yes.

“Q. I want you to tell me when you saw him drunk? A. Before going on shift.

“Q. Let me take the last time you saw him prior to the accident. Where did you see him intoxicated? A. Before going on shift.

“Q. I mean at what place more exactly?

“A. At the mouth of the tunnel where the men got together to go underground.

“Q. You mean the entrance into the mine?

“A. Yes.

“Q. What made you think that he was drunk? A. Well, he was staggering around.

“Q. How long before the time of the accident did this occur? A. Probably two weeks.

“Q. On what day of the week?

“A. I could not say about that.”

Is that true that I have read to you?

A. No, sir.

Q. Were you ever drunk or staggering around on the occasion testified to by this witness.

A. No, sir.

(Testimony of C. F. Yokum.)

Q. I will continue to read his testimony:

“Q. Now, when before that, did you see him drunk? [110]

“A. On several occasions.

“Q. I want to know the next occasion right back? A. Oh, I can't exactly answer that.

“Q. Every few days? A. Yes.

“Q. Then a few days before this occurrence you have mentioned, you saw Yokum drunk?

“A. Yes.

“Q. What do you mean by a few days?

“A. Oh, probably a week.

“Q. A week?

“A. Yes, something like that.”

Is that correct, is that true?

A. Well, I had been full a great number of times—feeling good to a certain extent.

Q. At the mine?

A. On the outside, among the boys.

Q. When going on shift?

A. No, not going on shift.

Q. I will read you from the testimony of Mr. Wall. Mr. Wall was testifying to Mr. Cannon:

“Q. What were the habits of Yokum during that time with reference to sobriety?

“A. Quite often he got under the influence of liquor.

“Q. What, with reference to the time he was on duty did you see, if anything, in that regard?

“A. I ran on him one evening when I was looking for steel, lying on a pile of muck asleep.

(Testimony of C. F. Yokum.)

“Q. Was his candle burning or out?

“A. His candle was out.

“Q. How long before this accident happened did that occur?

“A. I should judge about two weeks—ten days or two weeks.”

Is that true? A. No, sir. [111]

I got fired about two or three weeks after the accident; it might have been less than two weeks; I know it was a few days.

Cross-examination.

As near as I can remember, I was discharged somewhere near two weeks after the accident. I was discharged the very day that I was changed from Hall's shift to Greninger. The latter discharged me. I was never asleep in the mine, intoxicated or sober, while on duty.

Q. Don't you remember an occasion when you were found there by Mr. Wall asleep?

A. No, or no other man. My duty was coming on shift to go around and bar down the place where I thought they were going to set up the next night. I was the only man barring down. I used my judgment and figured when they would shoot the holes from the work that they were doing, and I went around and barred down according to that. The muck was not cleared away when I barred down. I made my examination just as far down as I could, as far down as the muck would permit. When I examined the place where the accident occurred, the muck was not cleared away. I examined the place

(Testimony of C. F. Yokum.)

the night before the accident and that night these fellows set up. I examined before they set up and went away. I could not say when the muck was removed.

Q. Now, did you come back after the muck had been taken away to examine it?

A. No, that was not my business.

Q. Was it never your business to examine after the muck had been taken away?

A. The machine-men after they came on and set up—

Q. You have not answered my question.

A. (Contg.) —after they set up they are supposed to look out for them. [112]

I have examined the face on several different occasions after the muck had been cleared away, but where there was no machine set up. I was at that place about half an hour before the accident. Frank Whitsett was there alone, starting a hole, a lifter. The hole was in 5 or 6 inches, perhaps, and he seemed to be having trouble with it. I helped him line up the machine. The muck had been cleaned out. I did not look for missed holes at that time.

Redirect Examination.

I did not see any missed holes at any time in that neighborhood. I looked at the place where the drill entered the face of the cross-cut. There seemed to be muck there. I could not recall how much muck there was. Naturally, they cleaned away the best they could before they set up. I did not see any indication of a missed hole in that vicinity. At the

(Testimony of C. F. Yokum.)

time I barred down I made my inspection for missed holes. It was not my duty to look below the muck. The muckers might find a missed shot and report it, and the men who would be setting up would look out for them. Every man had to look out for himself.

Recross-examination.

Q. How did the machine-men know who were coming on to find a face of a drift or a cross-cut cleared of muck and ready for the machine to be set up; how did they know that place had been inspected?

A. They would have to take that on their own hands; as far as I could I did; I could not be all over the mine. From my knowledge of the manner in which the mine was run, there was no man whose duty it was especially to search for and shoot missed holes. It was more or less the duty of every one in the mine. [113]

Q. I will ask you this: Did or did not every miner employed on those premises have to look out for missed holes? A. Why, certainly.

Q. You only know that from supposition?

A. Well, most all the mines I have worked in for the last 20 years I had to protect myself. That is generally customary among all mines.

Q. But you were instructed two days after you took that job to look out for missed holes and bar down?

A. Yes, I was instructed by the shifters, and I was working under those instructions at the time of this accident.

[Testimony of M. D. Thomas, for Defendant.]

M. D. THOMAS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I have been a miner 30 years and worked in different mines in Colorado, Montana, California and Arizona. I am familiar with the defendant's mine and was foreman there a month or six weeks before the accident. There is a custom among miners as to examining for unexploded blasts. The custom is to examine the place before a drill is set up, and if there is a missed hole to report and don't set up. The duty rests upon the man that is working.

Q. Is there any custom in mines relative to the employment of a missed-hole man?

A. I never heard of it, except upon this occasion.

Cross-examination.

I was succeeded as superintendent and foreman of the Balaklala Mine by Mr. Greninger; he had been under me as shift boss; I left and went to another mine. [114]

Redirect Examination.

During my administration no missed-shot man was employed in this mine.

[Testimony of W. A. Pritchard, for Defendant.]

W. A. PRITCHARD, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a graduate of Stanford University and a mining engineer. I have been superintendent and general manager of some twenty odd different com-

(Testimony of W. A. Pritchard.)

panies located in California, Australia and Mexico. I have been engaged in that business 14 years.

Q. Is there any custom among mine owners and miners relative to the detection of unexploded blasts?

A. It has always been left to the miners. By miners, I mean those men engaged in drilling and blasting

Q. Is there any rule relative to the employment of a missed-shot man in mines?

A. I never heard of a missed-shot man before this case.

Cross-examination.

I consider a chuck-tender a miner. They act as helpers and do their duties as miners. They change about in their position. The chuck-tender is waiting for a position as machine-man. The business of examining for missed holes devolves on both the machine-man and chuck-tender. Of course, the first day that a man is working as chuck-tender he would naturally be taking instructions from the machine-men, but as he works, after he has spent considerable time underground, he naturally would relieve the machine-man from some of that responsibility. The machine-man [115] orders him about. They work as companions in all the duties relative to their work and take turns about resting each other in their different duties. The machine-man teaches the chuck-tender to look for missed holes, how to drill, how to charge the holes, and to blast. It is not considered an apprenticeship but his instruction

(Testimony of W. A. Pritchard.)

lasts until some shift boss thinks enough of the man to make him a head man.

Q. Then when some shift boss thinks a chuck-tender has learned how to do the work of a machine-man and learned how to find missed holes, he is promoted to a machine-man, and from that time on the responsibility is on him as a miner?

A. Yes, sir. A man who did not learn about missed holes the first day he is underground, ought not to be permitted to enter again.

Q. Now, you say that a missed hole is very easy to detect after one day's experience in the mine?

A. One man can see as much as another.

Redirect Examination.

Q. Mr. Pritchard, what would you say would be the duty of a chuck-tender who had been employed six weeks and who was able to run a drill, as to finding missed holes?

A. His duty would be to find missed holes the same as a man who had been employed longer.

[Testimony of Edward A. Davis, for Defendant.]

EDWARD A. DAVIS, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a mining engineer and have been about 25 years. I have been engaged in a large number of mines all over the Pacific Coast. [116]

Q. Is there a custom in mines relative to the duty of discovering unexploded blasts or missed shots?

A. Yes, sir, there is.

(Testimony of Edward A. Davis.)

Q. And through whose agency is that done?

A. The miners. By miners, I mean the two men at the drill. It is the duty of the chuck-tender to count the shots. Every round of holes fired is supposed to be counted by the men who fired the holes. Where ten or a dozen faces each contain 12 holes are exploded by the men in going off their shift, the proper method of procedure would be for them to look over the face of the drift or cross-cut, or whatever it was, after the shots had been exploded. That is the duty of the miners. It is not customary to place that duty upon a missed-shot man.

Cross-examination.

Where there is more than one shift during the 24 hours in a mine the custom is as I have described, but the on-coming shift makes the examination. The object of counting the shots is that if there is a hole that is not accounted for, it is the duty of the shift to go back before quitting the mine and find the unexploded hole and fire it. It is a rare thing for there to be an unexploded hole. It does appear once in a while but it is very unaccountable. Perhaps in a hundred rounds fired you would not get more than one unexploded hole. I have never seen, as well as I can remember, where shifts were working so closely that each shift could not count its own holes. Where the distances are 30 feet apart it would be difficult to count them. I have never seen just such a set of conditions as you ask me about. According to my own experience it is the universal cus-

(Testimony of Edward A. Davis.)

tom to count the shots. Where there were three cross-cuts being worked within 30 feet of [117] one another, they would be fired one round after the other, and counted. If there was no doubt about the number of holes counted, it would be proof that all were shot. If they could not get back on account of the smoke to fire a missed hole, it would be their duty to report it to the foreman. The on-coming shift begins by barring down all the loose rock they can and throwing it back for the muckers, and looking at the face with reference to setting up again. I have never been in a mine where they employed a special man to bar down.

Q. I am asking you particularly as to what you said about what the shift should do when they come on with reference to barring down, in a case where the barring-down man is employed to do the barring down. Your testimony as to the duty of the on-coming shift in that respect does not apply, does it?

A. Yes, sir, it does still apply.

Q. How can there be any duty on the part of the on-coming shift to bar down when the barring down is done by somebody else especially employed for that purpose?

A. No, sir; in that case there would not be any duty on them because the work would have been performed already. It is the duty of the on-coming shift to bar down, if that work has not been done, and to set up and to go to work and throw the muck back and to look over the place generally. If they had another place for the men to drill, the muckers

(Testimony of Edward A. Davis.)

would throw back the dirt and take it away, run it out. The drillers would not handle it. They would simply look at the face and set up with reference to the best point to drill again. [118]

Redirect Examination.

They would look at the face to see that it is all right for drilling and that everything is in good shape to go ahead. They would look over the whole face for instance, in a case of this kind to see that there is no unexploded hole.

Q. Now, take the case of a mine that has a large number of drifts and cross-cuts exceeding a mile or a mile and a half in length, where work is proceeding on say, 50 faces, and where each shift has a gang of drillers of 25 men operating on 25 of those 50 different faces, and where at the conclusion of each shift 10 to 15 faces are blasted, and owing to the nature of the ore it is necessary for the men to retire where they cannot count the shots, and where if they attempted to count the shots, they could not, because of the shots going off together, and other things relative to the sound of the shots, and where they could not locate the various shots that did discharge, and in a mine where the on-coming shift came in after the blast and the smoke had cleared away, whose duty was it to discover missed shots?

A. The on-coming shift.

Recross-examination.

If there is a missed-hole man employed for that purpose in such a mine, the duty would be on both of them to look for missed holes. In the case where the

(Testimony of Edward A. Davis.)

shots can be counted, it is the duty of the off-going shift to go back and discover missed holes, or if they could not go back, then to report to the foreman, but it is always the duty of the on-coming shift, as a matter of self-preservation, to look over the face before starting the drill. [119]

[Testimony of F. A. Gowing, for Defendant.]

F. A. GOWING, called as a witness on behalf of the defendant, on being duly sworn, testified as follows:

I am a mining engineer and have been since 1903. I am a graduate of the University of California. I have had experience in various mines located in Arizona, California, Nevada and foreign countries.

Q. Is there any custom in mines with reference to the duty of a drill operator to investigate or look for missed shots? A. Yes, sir.

Q. What is that custom?

A. To trim down the faces and see whether there are missed shots left in them.

The same custom applies to chuck-tenders. It is not ordinarily the custom in mines to employ a missed-shot man.

Cross-examination.

I have done other work besides mining engineering. I have mucked and drilled, worked a mill smelter, civil engineering and underground. I have worked as a common miner about 2 years. By trimming down the faces, I mean that after a round is broken in the drift or face, it is the custom of the on-coming miners, before they set up a machine or

(Testimony of F. A. Gowing.)

go to drill, to trim off all the shattered rock in the faces. It is called barring down. I never worked in a mine where there was a man employed for the special purpose of barring down, and I don't know anything about the custom where there is a man employed for that special purpose. When I say that it is not ordinarily the custom to have a missed-hole man, I mean that in all the mines that I have had any experience with, they have not had such a man, so I do not know what the custom is that prevails in mines where they have a missed-hole man.

HERE THE DEFENDANT RESTED. [120]

**[Testimony of Lawrence Whitsett, for Plaintiff
(Recalled in Rebuttal).]**

LAWRENCE WHITSETT, recalled on behalf of the plaintiff, testified in rebuttal as follows:

In my experience in the big mines I never heard that it was the custom for the miner and chuck-tender to look out for and discover missed holes. In small mines it is the custom to count the reports. I have worked in 3 or 4 mines other than that of the defendant, where a missed-hole man was employed. I was never warned or instructed or directed in defendant's mine with reference to looking out for missed holes. I never heard of any custom in any mine with reference to the men going off shift after a round had been fired or going back into the mine immediately to look for missed holes. I have worked in 50 or 60 mines.

[Testimony of Enos Wall, for Plaintiff (Recalled in Rebuttal).]

ENOS WALL, recalled as a witness on behalf of the plaintiff, testified in rebuttal as follows:

I have been working as a miner 15 years. I never heard of a custom prevailing in large mines that the duty devolved upon miners to look out for missed holes. I know of a custom in large mines to have a missed-hole man. I have been employed in one mine, other than the defendant's, where they had such a man. I was never warned or given any instruction or direction by the defendant to look for missed holes. In small mines where there is one drift, no cross-cuts or raises, where there is only one shot fired, it is the general custom to go back after half an hour to look for the missed shots. When the photograph was taken the camera was placed on the opposite side of the main drift, about 20 feet away from where the machine sets. It was diagonally across the drift. The dark place in the center of the picture represents the main drift. [121]

Cross-examination.

I have worked in probably 25 or 30 different mines. It was in the Bingham Canyon Mine in Utah that a missed-hole man was employed.

[Testimony of Fred Whitsett, for Plaintiff (Recalled in Rebuttal).]

FRED WHITSETT, recalled as a witness on behalf of the plaintiff, testified in rebuttal as follows:

Q. While you were working in this particular

(Testimony of Fred Whitsett.)

mine prior to the accident, did you ever hear of a custom to the effect that it would be your duty to look out for missed holes?

Mr. WILSON.—We object upon the ground that having worked only at one mine he could not testify to a custom, and it would be hearsay, not rebuttal.

The COURT.—Objection overruled.

To which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 30a.

A. No, sir. I was never warned or instructed or directed to do anything with reference to looking for missed holes in that mine. At the time the picture was taken the camera was about 20 feet away from us, kind of crossways the drift. The dark place in the center of this photograph represents the main drift.

HERE THE TESTIMONY CLOSED. [122]

Charge to the Jury.

The COURT (Orally).—Gentlemen of the Jury, I will ask your careful consideration while I proceed to submit to you the principles involved that must govern you in the consideration of the evidence in this case for the purpose of reaching a verdict. And in that connection I will suggest preliminarily in view of the fact that counsel have both taken occasion during their respective arguments to state to you what they deem the law to be, I shall ask you to disabuse your minds of any suggestions of that kind, not necessarily that they may be wrong, but

simply because the law requires you to take your instructions from the Court. That being so if the Court commits an error, and leads you into mistake by giving you law that is erroneous, there is a place to correct that; whereas if you were to get an erroneous view of the law from counsel, there would be no way of correcting any such error that might creep into your minds.

This case involves two separate actions, both prosecuted against the same defendant corporation, to recover damages alleged to have resulted from defendant's negligence. Both actions arise out of the same transaction, that is the same producing cause of injury, and as both are against the same defendant and involve a common inquiry the law permits them to be united and tried in some respects as one. But the right of recovery is in law in each action separate and distinct, and hence, as I shall more particularly advise you, will require a separate verdict at your hands in each.

In the case in which Fred Whitsett is plaintiff, the action is prosecuted by that plaintiff, in his own right, to recover for his own benefit compensation for [123] the loss and damage alleged to have resulted to him through the defendant's negligence in causing the accident *the accident* counted upon, and the resultant wounds and injuries to his person as set forth in the complaint in that action.

In the other action in which J. E. Reardon, as administrator of the estate of Frank Whitsett, deceased, is plaintiff, the action is prosecuted by the plaintiff to recover for the benefit of James Whit-

sett, the father and next of kin of the decedent, damages alleged to have been suffered by the father and mother through the death of the son, resulting, as is alleged, from defendant's negligence in causing the accident in which Frank Whitsett was killed. Such a right of action the law gives under circumstances such as those here alleged.

As the evidence discloses, and about which there is no dispute, the cause of the injury in both cases, as above indicated, was the same, that is, an accidental explosion in the defendant's mine. That accident is in both instances alleged to have occurred through the defendant's negligence, and therefore the essential element of the cause of action in each case is the negligence of the defendant.

Negligence, as a ground of recovery in a civil action, is always relative to some duty owing by the party guilty of the negligent act to the person injured thereby. In this case it appears without controversy that at the time of the accident in question Fred Whitsett and Frank Whitsett, who were brothers, were both in the employment of the defendant, working in its mine where the accident in question occurred. This employment gave rise to the relationship known in the law as that of master and servant as then existing between [124] the Whitsetts and the defendant. This fact, and the fact that the injuries sued for in both actions arose out of the same accident or occurrence, renders the principles governing the relations of master and servant, which I am about to state to you, applicable to the rights of the parties to both of the actions in-

volved, and you will so treat them.

It is implied from the contract of employment between the master and his servant, in the absence of understanding or agreement to the contrary, that the master shall supply the physical means and agencies for the conduct of his business, and shall also furnish to the employee a reasonably safe place to work. It is also implied, and public policy requires that in selecting such means and agencies and place for his employee to work, the master shall not be wanting in proper care. His negligence in that regard is not a hazard usually or necessarily attendant upon the business, nor is it one that the servant in legal contemplation is presumed to risk.

It is the duty of the master to use reasonable and ordinary care in furnishing a safe place for his employee in which to work, and whatever risk the employee assumes in carrying on the master's business will not exempt the master from that duty.

Reasonable or ordinary care is such care as an ordinarily prudent person would exercise under like circumstances.

A servant does not assume risks resulting from the master's failure to so furnish a safe place to work, whether the performance of that duty is assumed by the master or is delegated to another.

In other words, a servant, in the absence of agreement to the contrary, has the right to look to his employer for [125] the furnishing of a safe place to work, and if the latter, instead of discharging that duty himself sees fit to delegate it to another ser-

vant, he does not thereby alter the measure of his own obligation.

This obligation imposed upon an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger to the employee may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of his employment it is made the duty of the employee to inspect it for himself, and if the employer fails to do so and in consequence thereof his employee while engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without fault on the part of the employee, the employer is liable to the employee for such injuries.

But you will understand that this duty of an employer to furnish an employee with a reasonably safe place in which to work is not absolute. He is not required at all hazards to furnish a safe place. His duty is fulfilled when he exercises ordinary care for that purpose. If he exercises such care as men of ordinary intelligence would usually exercise under like circumstances and conditions, taking into consideration the character of the work, then he has done all that is required of him by the law and cannot be held liable for injuries received by his employee in despite of such precautions. The master,

in other words, is not an insurer of the safety [126] of his employees. And of course this doctrine has no application to an instance should you find this to be one where by the terms of his employment the employee is himself required to look out for and see to the safety of his place for doing his work.

As I have said, the degree of care required of an employer in protecting his employees from injury is merely the adoption of all reasonable means and precautions to provide for the safety of his employees while they are engaged in his employment, but this degree of care is to be measured by the hazards or dangers to be apprehended or avoided.

The failure of the employer to exercise such reasonable diligence, caution and foresight for the safety of his employee as a prudent man would exercise under the like circumstances is negligence; and for such negligence the employer is liable to the employee for injuries suffered in consequence thereof while the employee is engaged in the performance of his duties, and without fault on his part contributing thereto.

An employer is likewise liable to his employee for loss or damage suffered by the latter in consequence of injuries received by the employee in the performance of his duties when such injuries result from the wrongful act, neglect or default of any agent or officer of such employer superior to the employee injured, or of a person employed by such employer having the right to control or direct the services of such employee injured, and without fault

on the part of the employee directly contributing thereto.

It is alleged in the case of Fred Whitsett that the defendant employed an incompetent man as missed-hole man, [127] and that this fact contributed proximately to that plaintiff's injury. With respect to the duty of the employer to use care in selecting his employees or officers, you will understand that while he must use due care in that regard the employer does not warrant the competency and faithfulness of any one of his employees to the others in his employ. His liability is not of so strict a nature as that. His duty in the matter of employing and retaining and watching over his employees is measured by the same rule of ordinary care and prudence above stated, and if he has selected them with discretion and omitted nothing that prudence dictates in overseeing them, and observing the character of their work, he has done all that the law requires of him. If he has failed in this duty, to the injury of his employee, then he is liable therefor.

The presumption is that an employee who is competent and fit when he enters the service of his employer, remains so; but this presumption may be overcome by evidence that satisfies you that such was not the fact.

It is presumed that the employer has done his duty in this regard, and has selected competent employees; hence it is incumbent upon one who seeks to recover from his employer for the carelessness of a fellow-employee, to show, not only that the fellow-employee was in fact careless, but also that the employer had

knowledge of such carelessness, or by the exercise of reasonable care could have had such knowledge, or was negligent either in the selection or retention of such employee. There must be some neglect or fault in the employer proximately contributing to the injury before he can be made liable in this respect, and the burden of showing [128] such fault is on the one alleging it.

Where an employee complains that he was injured through the incompetency of a fellow-employee, it should appear that the incompetency of such fellow-employee was the proximate cause of the accident and injury. The mere fact that the fellow-employee may have been incompetent, and that the employer had knowledge thereof, is not sufficient, unless you are satisfied from the evidence that such incompetency was the cause of the injury, or a cause directly contributing thereto and without which the injury would not have happened.

An employee must himself use care for his own safety proportionate to the risks of his employment. Such dangers as are obvious to the senses, or which with reasonable care could be discovered, if a thing it is his duty to look out for, are under the law assumed by him, and he cannot recover for injuries resulting from such dangers, since it is his duty to use such care and precaution to avoid them.

To render the employer liable for injuries to an employee, the latter must have exercised ordinary and reasonable care for his own safety, that is, such care as an ordinarily prudent person would exercise under the same or similar circumstances. The de-

gree of care to be exercised by the employee must be adjusted to the character of the work and the limitations of his duty and should be in proportion to the dangers of the employment. Although a master may be negligent, yet if the employee is himself guilty of the negligent act which causes or directly contributes to his injury, he cannot recover.

Inasmuch as the defendant in this case is a corporation, it is pertinent to suggest to you that a corporation can only act by and through its agents and authorized representatives. [129] It is therefore responsible for the acts and omissions of its duly authorized agents to the same extent as a natural person would be for his own acts under like circumstances.

In other words, the negligence of the agents and representatives of a corporation, that is, its officers or employees, is the negligence of the corporation itself, and the corporation is liable therefor to an employee injured in consequence thereof to the same extent as would be a natural person under like circumstances.

An employer, whether a natural person or a corporation, is required under the law to indemnify his employee for losses caused by the employer's want of ordinary care, where the employee is not himself at fault.

An employer, whether a natural person or a corporate body, is under obligation not to expose the employee in conducting the employer's business to perils or hazards against which he may be guarded by proper diligence on the part of the employer.

The burden of proving negligence on the part of the defendant rests on the plaintiff, and before he will be entitled to a verdict he must produce a preponderance of evidence,—that is to say, evidence which is in some degree stronger than that opposed to it, and sufficient to satisfy you to a moral certainty, or that degree of proof which produces conviction in an unprejudiced mind,—that the defendant was guilty of negligence as charged, proximately causing the injury complained of. You cannot assume that the defendant was careless or negligent from the mere fact of the accident alone, or from the fact that plaintiff was [130] injured. The law presumes that defendant was not negligent but this presumption may be overcome by evidence satisfying you, to the extent I have indicated, to the contrary. It is for the plaintiff, as I say, to prove the negligence alleged, and when a plaintiff has introduced evidence sufficient to prove that charge, there is still no obligation on the part of the defendant to overcome it by a preponderance of evidence on his part. The burden of proof being on the plaintiff, all that is required of a defendant is that it produce evidence to offset, in the mind of the jury, the effect of the plaintiff's evidence, and if the jury find, upon the whole case as made, that the plaintiff has not shown by a clear preponderance of the evidence that the defendant was guilty of negligence causing the injuries complained of, that is, if, in your judgment, the evidence is equally balanced, you should find for the defendant. Or if you are satisfied that the accident was of a character which was unavoidable, then

the verdict should be in favor of defendant.

Should you find, as claimed by defendant, that instead of its being the duty of the missed-hole man, as claimed by plaintiffs, it was the duty of the miners employed by the defendant in its mine, working in the capacity in which the Whitsetts were employed, to examine the places in which they were put to work and look for missed shots or holes, and that the Whitsetts had been informed of that duty, and you determine that the explosion of a missed shot caused the injuries complained of, and that such missed shot could have been discovered by them by the exercise of due care, in such case, the Whitsetts being fellow-servants, neither plaintiff can recover for the negligence of the other, and your verdict [131] should be for the defendant.

It is contended in this case that the Whitsetts were chargeable with negligence on their part which directly contributed towards their injury. This constitutes a defense, if it is shown. The rule is, as I have before indicated, that when the plaintiff is in part responsible for his injury, through his own want of care proximately contributing thereto, though the defendant was also in part chargeable with negligence, no remedy is given in law. But in this defense the burden rests upon the defendant to establish it, and it must do so by the same degree of proof by which the plaintiff is required to prove his case, that is, by a preponderance of the evidence.

If you find that the Whitsetts were directly in fault in the matter of causing the accident and injury complained of, of course no damages can be recovered by

either one, since they would be guilty of contributory negligence which would preclude recovery.

In this connection, however, you will bear in mind that if you find that the defendant in operating the mine in question provided an inspector called a "missed-hole man," and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck-tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, [132] and to act upon that presumption, and would not be guilty of negligence for failing to make such inspection himself.

By applying the principles I have stated to you to the facts as you may find them from the evidence, you will be able to determine which way your verdict should go.

As you have observed from the argument, the theory of the plaintiffs is that it was the duty of the defendant, through its agent employed for the purpose—the missed-hole men—to examine and inspect its mine at the point where the Whitsetts were put to work on the occasion in question, for the detection of any missed holes or missed shots, or other source of danger, that might there exist, and to take proper care to render it safe and harmless, and that the Whitsetts

were not charged with any such duty; that they had a right to rely upon this duty being performed by the missed-hole man, and were entitled to assume that it had been performed before they were set to work; that the defendant through its negligence and that of its officers failed to perform this duty, and as a result of such negligence the accident and injury resulted, without any fault or want of care on the part of the Whitsetts directly contributing thereto. Should you find this theory to be sustained by the evidence, to the degree I have stated, then the plaintiffs will undoubtedly be entitled to recover, and your verdict should be in their favor.

The defense of the defendant, on the other hand, is, as before indicated, that under the terms of their employment, and the known manner of working the mine, it was the duty of the Whitsetts to look for and detect any such missed holes or unexploded blasts that might exist at the place of their employment and that this duty did not rest upon the defendant; [133] that it was wholly through the negligence of the Whitsetts in failing to take proper precaution and make an examination of the face of the cross-cut, that the explosion and injury occurred, and that defendant was in no respect responsible therefor. It is further claimed by the defendant that even if it can be held under the evidence that it was its duty to look after missed holes or unexploded blasts, the evidence shows that it took all due and ordinary care in this instance to discover or detect any such; and that if it was a missed shot which caused the injuries complained of, it appears that it was so concealed as

to baffle and defeat any ordinary means or precaution for discovering it; and that consequently the defendant did all that its duty demanded and cannot be held responsible for the injuries complained of.

Should you find that these defenses, or either of them, is sustained by the evidence, then it is sufficient to excuse the defendant, and your verdict should be in its favor. These questions rest with you.

As previously suggested to you, the right of recovery in these two actions being separate and distinct it will be necessary for you to find a separate verdict in each one of those actions.

As to the action brought by Fred Whitsett, which is to recover damages on his own behalf, the law is that every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money which is called damages. For the breach of an obligation not arising from contract (and this is a case of that character), the measure of damages is the amount which will compensate for the detriment or loss proximately caused thereby, [134] whether it could have been anticipated or not. If, therefore, in the case of Fred Whitsett, you find, under the principles that I have stated to you, that the plaintiff is entitled to recover, you may award him such compensatory damages within the amount claimed in his complaint (\$50,750) as will in your good judgment compensate him for the pecuniary damage proximately caused by the injury suffered by him, if any, as the result of the accident complained of; and in this connection you may consider his earning capacity at

the time of the accident, his physical capacity at that time, and the physical and mental suffering, if any, which has been caused to him as a result of his injuries, the extent and severity of those injuries, the degree and character of pain suffered by him, if any, and its duration and severity. You may also consider whether the injuries are temporary or permanent; and from all these elements resolve what sum will fairly and reasonably compensate the plaintiff for the loss suffered through such injuries. If you find that his injuries are more or less permanent, you may also take into consideration the loss, if any, which he will be reasonably certain to suffer in the future as a result of such injuries, and in determining this question you may consider, in connection with other evidence in the case, his probable expectation of life.

In the action brought by the administrator of Frank Whitsett, deceased, should you reach the conclusion that the plaintiff is entitled to a verdict you will award such amount as in your judgment will be a reasonable compensation to the father and mother of the deceased, for whose benefit the action is prosecuted, for the actual pecuniary loss suffered by them from the death of their son. That is, your verdict [135] should be limited to that amount which the evidence shows that the deceased would have probably earned, and, after paying his own expenses for his food, lodging, clothing, and the necessary and ordinary expenses and costs of living, would have given or turned over to his father and mother for their own use. The law measures the injury or loss suf-

ferred by the father or mother in a case of this kind in dollars and cents. It does not take into account their grief and sorrow over the loss of their son, as that is an element which the law does not undertake the measure in pecuniary damages. In other words, the damages must be simply remunerative, and that remuneration must be restricted to such sum as will amount to the reasonable expectation that the father and the mother had of pecuniary or money benefit arising from the continuance in life of the deceased. That is the question to be determined in such a case, and you should not, in reaching your conclusion, speculate as to the amount or indulge in presumptions or conjectures not warranted by the evidence, but you should determine the amount solely by the evidence introduced before you entirely free from any sentiment or sympathy on the one hand, or bias or prejudice on the other. In reaching your conclusion in this case, as in the other, you may regard, with the other evidence in the case, the expectancy of life of the deceased and of those to be benefited by the recovery. In most cases it is the expectancy of life of the deceased alone which is the element to be considered by the jury, but in a case like this, where the respective ages of the parties entitled to recover and of the deceased indicate that the expectancy of life in the beneficiary is less than that of the deceased, it is the expectancy of life of the beneficiary of the recovery [136] that must be considered in fixing the damages.

Standard life or mortality tables are admissible in such an action to aid you in your inquiry. Such

tables are not conclusive upon the question of the duration of life, but are merely competent to be weighed, with the other evidence in the case, tending to show the state of health, habits of life, and other conditions, as well as the vocation in life of the beneficiary. In any given case the expectancy of life of the person under consideration (in this case the beneficiaries) may be greater or less than that of the average person, and the amount of damages to be allowed should be increased or diminished accordingly. In applying these instructions to the case which we are now considering, you will, of course, be governed by its facts and circumstances as proved. You are dealing simply with the question of compensation for the loss suffered. The law does not contemplate that the estate of the beneficiaries should be increased beyond what they have actually suffered.

Now, gentlemen of the jury, those are all of the specific features of the law that I care to state to you. There are some general considerations which perhaps should be suggested to you, and that is that the jury alone pass on the facts of the case. That duty rests on your shoulders, and it cannot be shared by the Court. It is neither the purpose nor the intent of the Court, nor its privilege to in any wise influence, or undertake to influence the jury in their deliberation on the facts. As I say, that is something that rests on your conscience alone. And if you have gained any idea throughout the trial of the case, or any impression, as to the attitude of mind of the Court, you should dismiss it entirely from your minds, not only because no such purpose [137]

would be in the mind of the Court, but because it should not, even if it were so, affect your deliberations in the case. You are to determine this case for yourselves from the facts as they are delivered from the witness-stand.

In passing on the facts you become also the judges of the credibility of the witnesses. You determine that, of course, not arbitrarily; it must be in subordination to the principles of law, and the rules of evidence, but it rests with you to say what degree of credibility you will accord to any witness who comes on the stand. You determine that by observing the character of the witness, his manner on the stand; the character of his testimony, how far it is such as to be probable, and in accord with your own reason, or how far it appears to be improbable either inherently, or when viewed in connection with all the evidence in the case, and you will say to what extent you believe any witness that is sworn on the witness-stand.

A witness is presumed to tell the truth, and he is to be accorded that presumption unless the manner of his testimony or what he testifies to, or the other evidence in the case affecting his testimony satisfies you he is not telling the truth; but if you make up your mind that a witness is not telling the truth because he is mistaken, then while it should make you more careful to weigh the balance of his testimony, you are not called on to discredit his testimony simply because he has made a mistake; and if you determine in your minds that a witness has come on the stand, and has recklessly and intentionally sworn

to a falsehood, something he knew not to be true when he was stating it, you should very carefully weigh his evidence in other respects, and entirely discredit it, [138] unless you are satisfied from the other evidence in the case he has in some respects been telling the truth. When there arises in a case, such as there has in this, a conflict in the evidence on any given point, it rests with the jury to resolve that conflict as best you may, and you do it by applying the principles I have just been stating to you, and determining which of the witnesses engaged in that conflict of testimony have been telling the truth. There are one or two points in this case where the evidence is decidedly conflicting, and I can afford you no greater aid than I have already indicated to you for solving those differences. It simply rests with you. Happily in my mind in cases of this kind it does rest with the jury, because your minds are not circumscribed by the same considerations which flow from the mind of the trained lawyer, or Judge, growing out of his knowledge of strict principles of law, and rules of evidence. Your minds are freer than that. You look at it from a plain common-sense point of view of the man who is unhampered by technical considerations, or rules, such as sometimes beset the mind of the Judge. I think you will have no difficulty in this case in resolving what the facts are, and determining what your verdict shall be in these two cases.

Of course, gentlemen, as has been suggested to you, there is no place in the administration of the law, either in this or any other case, for the play

of sentiment. We do not deal with that in courts. We must determine cases upon the evidence in the light of the cold law, and you will bear that in mind. Whatever the rights of these parties are, are to be determined upon those lines. If these two boys,—the one a plaintiff, and the other represented by his administrator—suffered the injuries of which they complain under circumstances [139] which you find within the principles I have stated to you to render the defendant liable, they are entitled to compensation. If they did not, they are not entitled to compensation. It is simply a question of law and fact; the law I have given you, or endeavored to give you to the best of my ability, and the fact rests with you.

The Clerk has prepared forms of verdict which you will find to accord with instructions I have given to you as to the necessities, and when you have reached a conclusion you will come into court and report.

You all understand, gentleman, that in the federal courts the verdict of the jury must be unanimous, and cannot be rendered by less than the entire jury. Are there any exceptions?

**[Exceptions to Certain Instructions Given and
Refused.]**

Mr. WILSON.—The defendant excepts to that portion of the charge relative to the assumption of risk by the employee. Also that part relative to the delegation of duty by the employer to furnish a safe place for the employee to work. Also to that part of the charge relative to the duty to provide

for an inspection of the place of work, that is to say, the duty of the employer. And also that part of the charge where the jury are instructed that if they find the employer has furnished a missed-hole man, the miner then does not assume the risk of the dangers connected with the work. The defendant also excepts to the refusal of the Court to [140] charge the jury according to the first instruction submitted with reference to both cases.

Mr. WILSON.—We will except to the refusal of the Court to give Instructions No. 1; No. 4; No. 5; No. 6; No. 8; No. 9; No. 12; No. 17; No. 25; No. 26; No. 31; and No. 32, all and each of them being submitted to your Honor in both of the cases now on trial, and to the refusal of the Court to give instructions No. 2 and No. 4 of those separate instructions relative to the Reardon, No. 15,144.

The COURT.—Very well.

(RECITALS RELATIVE TO VERDICTS,
JUDGMENTS, AND ORDERS DENYING PETI-
TIONS FOR NEW TRIALS.)

(Whereupon the jury retired at 5:20 and returned into court at 6 o'clock with a verdict for the plaintiff in the amount of \$5,000 in case No. 15,143; and \$3,500 in case No. 15,144.)

That thereafter a judgment was entered in favor of plaintiff in each case upon such verdict, and it is further certified that within the time allowed by law and the orders of this Court, defendant duly filed its petition for a new trial herein, which petition came on duly and regularly for hearing and which was denied by the Court. [141]

Instructions to the Jury Requested by the Defendant and Refused.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 1 of the instructions requested by the defendant as above set forth):

“You are instructed by the Court that on the evidence and under the law you will return a verdict in this case for the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 40.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the instructions requested by the defendant as above set forth):

“The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions, if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 41. [142]

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 5 of the instructions requested by the defendant as above set forth):

“If you find from the evidence in this case that the accident complained of was such as could, by no reasonable possibility, have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 42.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 6 of the instructions requested by the defendant as above set forth):

“In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time

of the accident, the defendant was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which, it may appear after the accident, would have avoided it. The requirement [143] is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily prudent persons in the same situation, prior to the accident."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 43.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 8 of the instructions requested by the defendant as above set forth):

"I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses."

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 44.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 9 of the instructions requested by the defendant as above set forth): [144]

“It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employer knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing, owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers.”

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 45.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 12 of the instructions requested by the defendant as above set forth):

“The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged in extremely dangerous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations, and I charge you that the occupation of a miner is extremely dangerous, and that an employee engaged in mining is required to use every great precaution to avoid an injury. A miner should be vigilant and careful in his own behalf and should use [145] a degree of care proportioned to the degree of danger in the ordinary discharge of his duties. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation, and which a reasonably prudent person would use under like circumstances.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 46.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 25 of the instructions requested by the defendant as above set forth):

“Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a ‘two-wedged sword’ and destroy the plaintiff’s right of recovery, because, if the employee knew, or should have known, of his co-employee’s incompetency, and neglected to call his employer’s attention thereto, he is treated as being guilty of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer’s part may have the same result as to the injured employee.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 47.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 26 of the instructions requested by the defendant as above set forth):

“If you find from the evidence in this case that the [146] defendant employed a man by the name of Yokum for the purpose of detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in em-

ploying or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in

this particular, your verdict must be for the [147] defendant.

“In the case brought by Reardon, for the death of Frank Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective, or of the deceased in that case, then your verdict must be for the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 48.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 31 of the instructions requested by the defendant as above set forth):

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendants’ mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered

by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant.”

Which request was refused, and to which ruling the [148] defendant then and there excepted and now assigns the same as

ERROR NO. 49.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 32 of the additional instructions requested by the defendant as above set forth):

“If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendants’ mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as

ERROR NO. 50.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 2 of the additional instructions requested by the defendant as above set forth):

“If, upon a consideration of all the evidence in the case of Reardon, you should reach the conclusion that the plaintiff is entitled to your verdict, you must not arbitrarily [149] award him any amount within the sum demanded in the complaint, but the amount awarded by you must be such an amount only as will be a reasonable compensation to the father and mother of the deceased for the actual pecuniary loss sustained by them through the death of Frank Whitsett. In other words, in the event of your finding for the plaintiff, your verdict must be restricted in this case to that amount which the evidence shows that the deceased would have earned, and, after paying his own expenses for his food, lodging, clothing and the necessary and ordinary costs of living, would have given or turned over to his father and mother for their own use. The law measures the injury or loss sustained by the father and mother in a case of this kind in dollars and cents. In other words, the damages must be simply remunerative, and that remuneration must be restricted to that sum of money that will amount to the reasonable expectation that the father and mother had of pecuniary, or money, benefit arising from the continuance in life of the per-

son who was killed. The question is, what would the father and mother of the deceased, in all reasonable probability, have received pecuniarily by the continuance in life of the deceased? That is the question for you to determine in assessing damages in this case, should you determine that plaintiff is entitled to any damages whatsoever; and in passing upon the question of the amount, you are not allowed to speculate or indulge in presumptions or conjecture not warranted by the evidence, but you must determine the amount of damages solely by the evidence introduced before you in this case. If you are not able to determine from the evidence that the father and mother of the deceased have suffered a pecuniary injury or loss in the death of Frank Whitsett, then [150] it becomes your duty and you must return a verdict for the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as

ERROR NO. 51.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the additional instructions requested by the defendant as above set forth):

"Nothing can be recovered in this action for any pain or suffering or injuries or damages sustained by the deceased Frank Whitsett."

Which request was refused, and to which ruling

the defendant then and there excepted, and now assigns the same as

ERROR NO. 52.

Dated this 22d day of December, 1912.

C. H. WILSON,
Attorney for Defendant. [151]

*In the District Court of the United States for
the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,

Defendants.

Admission of Service [of Copy of Bill of Exceptions].

Due service and receipt of a copy of the within bill of exceptions, at San Francisco, California, is hereby admitted this 26th day of December, 1913.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff. [152]

*In the District Court of the United States for
the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,
Defendants.

Stipulation [That Bill of Exceptions is Correct, etc].

IT IS HEREBY STIPULATED AND AGREED
by and between the attorneys for the respective par-
ties to the above-entitled cause that the foregoing
bill of exceptions is correct, and that the same may
be certified and authenticated by the Honorable
William C. Van Fleet, the Judge before whom said
cause was tried, as a full, true and correct bill of
exceptions.

Dated this 21st day of March, 1914.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Plaintiff.

C. H. WILSON,
Attorney for Defendants. [153]

*In the District Court of the United States for
the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,

Defendants.

Order Settling, etc., Bill of Exceptions.

That said bill of exceptions was duly prepared and submitted within the time allowed by the order of the Court, and is now signed, sealed and settled as and for the bill of exceptions in the above-entitled case, and the same is hereby ordered to be a part of the record in said action.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 23d day of March, 1914.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Mar. 24, 1914. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [154]

*In the District Court of the United States in and
for the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,
Defendants.

Petition for Writ of Error.

Now comes BALAKLALA CONSOLIDATED COPPER COMPANY, a corporation, defendant herein, and feeling itself aggrieved by the verdict of the jury and the judgment entered thereupon on the 23d day of May, 1912, whereby it was adjudged that plaintiff have and recover from defendant the sum of Three Thousand Five Hundred Dollars (\$3,500.00) and costs and disbursements in this action, says that in said judgment and in the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the Assignment of Errors, which is filed with this petition;

WHEREFORE, this defendant prays that a Writ of Error may issue in its behalf to the United States Circuit Court of Appeal, in and for the Ninth Circuit, and according to the laws of the United States in

that behalf made and provided, and that said defendant be permitted to prosecute the same to said last-mentioned court, for the correction of errors so complained of, and that a transcript of the record, proceedings [155] and papers in this cause, duly authenticated, may be sent to said last-mentioned court, and that an order be made fixing the amount of a supersedeas bond, which the defendant shall give and furnish upon said Writ of Error, and that upon the giving of said bond all further proceedings in this court be suspended, stayed and superseded until the determination of said Writ of Error by the said United States Circuit Court of Appeal in and for said Ninth Circuit. And your petitioner will ever pray.

Dated this 22d day of November, 1912.

C. H. WILSON,

CHICKERING & GREGORY,

Attorneys for Defendants.

Due service and receipt of a copy of the within petition for Writ of Error is hereby admitted this — day of November, 1912.

C. J. JACKSON and

W. M. CANNON,

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 22d, 1912. W. B. Mal-
ing, Clerk. [156]

*In the District Court of the United States in and
for the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,
Defendants.

Assignment of Errors.

Now comes defendant herein, BALAKLALA CONSOLIDATED COPPER COMPANY, a corporation, and in connection with its petition for a Writ of Error in the above-entitled cause, suggests that there was error on the part of the above-entitled court in regard to the matters and things herein-after set forth, and specifies the following as errors upon which it will urge its Writ of Error in the above-entitled action, to wit: [157]

ASSIGNMENTS OF ERROR.

I.

That the District Court of the United States in and for the Northern District of California erred in permitting counsel for the plaintiff to state, in the presence of the jury, "In this case, there is certain indemnity insurance against this kind of action, and the insurance company is defending, through its own counsel, this action. Therefore, I have a right

to inquire.” And that counsel for plaintiff was guilty of misconduct in making said statement in the presence of the jury. That defendant objected to said statement and to the conduct of counsel in making said statement, which objection was overruled by the Court and the defendant then and there excepted thereto, which exception was duly allowed by the Court.

II.

That on May 15th, 1912, and while the jury was being empaneled in the above-entitled action during the examination of N. S. Arnold, a talesman on his *voir dire* by counsel for plaintiff, the following proceedings were had:

“Mr. CANNON.—Q. Have you any connection, either as a stockholder or otherwise, with an indemnity company or insurance for the purpose of insuring people against personal injuries?

Mr. WILSON.—I object to that question as immaterial.

Mr. CANNON.—I do not think it is immaterial. I would like to state why I ask the question.

The COURT.—What is the reason?

Mr. CANNON.—The reason is—

Mr. WILSON.—I object to the reason being stated.

The COURT.—I am asking for it. [158]

Mr. CANNON.—In this case there is certain indemnity insurance against this kind of action and the insurance company is defending,

through its own counsel, this action. Therefore, I have a right to inquire.

Mr. WILSON.—I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

Mr. WILSON.—We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT.—The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel unless it should appear it is a pertinent fact."

That the Court erred in refusing to discharge the jury on motion of defendants' counsel.

III.

The following question was then propounded to said N. S. Arnold, a talesman on his *voir dire*.

"Mr. CANNON.—Q. Have you any connection, either as a stockholder or otherwise, with any indemnity company as I have described?"

Mr. WILSON.—We insist upon our objection.

The COURT.—I overrule the objection.

Mr. WILSON.—I will take an exception."

That the Court erred in permitting said question and in allowing counsel to bring before the jury notice and information of the fact that this action was defended by an indemnity company and that defendant was protected by indemnity insurance.

IV.

That, after the jury was sworn to try the above-entitled cause and before testimony was introduced

in said cause, defendant by its counsel, moved the Court for an order requiring that plaintiff [159] elect between the two causes of action set forth in the complaint, to wit: One cause of action stated in the only count of the complaint on the theory that defendant had failed to furnish a safe place in which to work, and the second in the same count on the theory that defendant had failed to furnish a competent co-employee, the violation of which one or either of these duties giving to the plaintiff a cause of action and each of them being separate dealings. That said motion, when made, was denied by the Court which ruling, defendant now assigns as error.

V.

That the Court erred in denying the motion of defendant for an order of the trial Court that plaintiff be restricted in his proof to the particular cause of action stated in his complaint, to wit: That the injury here complained of was approximately caused by the negligence of the defendant in failing to provide a careful and competent man, known as a "*miss-hole man*" or a "*missed-shop man*." To which ruling, defendant duly and regularly excepted and now assigns as error.

VI.

That, during the trial of said action, Lawrence Whitsett, was called as a witness in behalf of plaintiff and was asked the following question:

"Mr. CANNON.—Q. I will ask you, Mr. Whitsett, from your experience whether when there remains an unexploded blast or what is called a '*missed hole*,' whether in driving an-

other hole in the vicinity of the 'missed hole' or one that is about to cross it or driven into it, there is danger under those circumstances of the 'missed hole' exploding?

"A. It is dangerous."

Defendant objected to this question and answer as immaterial and not the subject of expert testimony, which objection was overruled [160] and the defendant then and there duly excepted thereto, which ruling the defendant now assigns as error on the part of the trial Court.

VII.

The following question was then propounded to the said witness:

"Q. What was done with Fred after he was taken from the mine?

A. He was taken to the hospital.

Q. How was he taken to the hospital?

A. In a wagon."

That defendant objected to the last question and answer as immaterial, which objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question, and in overruling said objection.

VIII.

Said witness further testified that Fred Whitsett was taken to the hospital on the day of the accident.

"Q. He was fixed up—furnished with a cot?

A. They had a cot for him. Fred was put in a wagon on a cot."

Defendant objected to this question and answer on the ground that it was incompetent, irrelevant and

immaterial, and no part of the *res gestae*. The objection was overruled and the defendant then and there excepted thereto, which ruling the defendant now assigns as error on the part of the trial Court.

IX.

The following question was then propounded to said witness of and respecting Fred Whitsett, the plaintiff.

“Mr. CANNON.—Q. State what the manner and appearance of your brother at the present time is, physically and mentally as compared with his condition at and before the time of this accident.

A. He does not seem to have the mind he had before the accident. [161]

“Mr. WILSON.—Let me move to strike out the answer as not responsive and incompetent, no proper data laid for it.

The COURT.—It is not necessary, Mr. Wilson. You have your exception to the ruling.”

That defendant objected to this question and answer as incompetent, irrelevant and immaterial, calling for the opinion of the witness, and no proper foundation made. The objection was overruled. The defendant then and there excepted thereto. That the Court erred in allowing said witness to answer said question and in denying defendant's motion to strike out said answer.

X.

The following question was then propounded to said witness:

“Q. Had you, prior to this accident, dis-

covered any 'missed holes' in the places where you were working? A. Yes, sir.

Q. Had you done anything with reference to these 'missed-holes'?

A. I reported them to the company."

That defendant objected to the last question and answer as immaterial, incompetent and irrelevant, and no part of the *res gestae*. Which objection was overruled. Defendant thereupon then and there excepted thereto. That the Court erred in allowing said witness to answer said question.

XI.

The following question was then propounded to said witness:

"Q. To what particular person in connection with the Company did you report these 'missed holes'?

A. To B. Hall."

Defendant objected to this question and answer as immaterial, irrelevant and incompetent, and no part of the *res gestae*, which objection was overruled and the defendant then and there excepted thereto. That the Court erred in allowing said witness to [162] answer said question.

XII.

The following question was then propounded to said witness:

"Q. When he came back to work, what was his appearance?

A. Well, he would be intoxicated."

Defendant objected to this question and answer as immaterial. The objection was overruled and the defendant then and there excepted thereto. That

the Court erred in allowing said witness to answer said question.

XIII.

The following question was then propounded to said witness:

“Q. Was he, your father, at this time at the time of the accident to your brother or for several years prior thereto, able to work?

A. No, sir.”

Defendant objected to this question and answer as incompetent, irrelevant and immaterial.

The objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XIV.

The following question was then propounded to said witness:

“Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally? A. They were very poor.”

Defendant objected to this question and answer as irrelevant, incompetent and immaterial, not the proper proof of damages in the case, calling for the conclusion of the witness, and on the grounds shown in the California case of JOHNSON vs. BEADLE.

Objection was overruled and the defendant then and there excepted thereto. [163]

That the Court erred in allowing said witness to answer said question.

XV.

The following question was then propounded to said witness by the Court:

“Q. Would he go to cross-cuts where the holes had been exploded, or where they had not?

A. Where they had been exploded.”

That defendant objected to this question and answer as leading, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in asking and allowing said witness to answer said question.

XV $\frac{1}{2}$.

The following question was then propounded to said witness by the Court:

“Q. State, if you can, where he would go.

A. He would go to different cross-cuts and places through the mine.”

Defendant thereupon moved that the answer to said question be stricken out as hearsay, and as a conclusion and opinion of the witness, which motion was denied by the Court.

That the Court erred in denying defendant's said motion to strike out.

XVI.

The following question was then propounded to said witness:

“Q. State what the practice was, Mr. Whitsett, with reference to what the men did in going back to work day by day or where they would go to work.

A. They would probably go to some other place. There is many places they are liable to take. Any place in the drift.” [164]

Defendant objected to this question and answer as immaterial, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XVII.

Enos Wall, being called as a witness on behalf of the plaintiff, and the following question was then propounded to said witness:

“Q. To get him from the point where you found him to where the skip was, how did you have to go; where did you have to go?”

A. We went from No. 4 out through No. 3 and to skip at No. 3 and down the main tunnel.”

Defendant objected to this question and answer as incompetent, no part of the *res gestae* and matter occurring after the accident, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XVIII.

The following question was then propounded to said witness:

“What kind of a wagon did you take him to the hospital in? A. It was a dead X wagon.”

Defendant objected to this question and answer as immaterial, no part of the *res gestae*, no element of damage in the case, and incompetent. Which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XX.

Ed Whitsett, called as a witness on behalf of the [165] plaintiffs, the following question was then propounded to said witness:

“Q. What appears to be his mental condition now with respect to memory and his mentality generally, as compared with what he was before the accident?”

“A. Nothing at all. The mind isn’t like it was before at all.”

Defendant objected to this question and answer as incompetent under the pleadings, irrelevant, that there is nothing of that character alleged in the pleadings, and that this was a point attempted by defendant to be cured in the complaint at the time of the demurrer, which demurrer in this particular was overruled; which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXI.

That the following question was then propounded to said witness:

“Q. And what else is the trouble with your mother?”

“A. Other ailments, I could not say what; that has been the principal thing, so the doctor told me.”

Which answer defendant moved to strike out as hearsay, which motion was denied by the Court and

the defendant then and there excepted thereto.

That the Court erred in allowing said answer to stand and in denying said motion to strike out said answer.

XXII.

Fred Whitsett, called as a witness on behalf of the plaintiffs, the following questions were propounded to said witness.

“Q. You were under the influence of an anaesthetic? A. Yes, sir. [166]

“Q. What was the operation.

“A. Removing bones.

“Q. From your leg? A. Yes sir.”

“Mr. WILSON.—It strikes me that the witness is unable to testify to that fact, if your Honor please. I move to strike it out.

“Q. By the Court: All you know you went on the table at 8 o'clock in the morning?

“A. Yes, sir.”

That on defendant's motion to strike out said answer and said matter and facts, the Court denied said motion and defendant then and there excepted thereto.

That the Court erred in denying said motion to strike out.

XXIII.

That the following question was then propounded to said witness:

“Q. What was the total expense over and above what you were entitled to at the hospital?

“All over \$248.00.”

Defendant objected to this question and answer as

unfair to the witness, incompetent, irrelevant and immaterial, and on the ground that plaintiff is entitled to recover the amount he himself spent or was spent on his account; which objection was overruled, and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXIV.

The following questions were propounded to said witness:

“Q. On the day of the operation at the hospital at the end of the operation at 6 P. M., what were they doing to you when you woke up?

“A. They were rubbing my arms.

“Q. How many were doing it?

“A. Three of them.

“Q. Three of them working on you?

“A. Yes, sir.” [167]

“Mr. WILSON.—I move to strike that out as no part of the injury or damage, incompetent and irrelevant.”

That defendant's motion to strike out, as above shown, was denied by the Court, and defendant then and there excepted to.

That the Court erred in denying defendant's said motion to strike out the answer to said questions and said matter.

XXV.

That thereafter and after the close of the testimony of Fred Whitsett, Mr. Cannon made the following offer in words following, to wit:

“Mr. CANNON.—We offer now in evidence, if your Honor please, the American Tables of Mortality to show the expectancy of life of these plaintiffs. It will not be necessary to introduce the whole table, will it?

“Mr. WILSON.—I have an objection, if your Honor please: We object to the table on the ground that under the facts shown in this case, it is incompetent, irrelevant and immaterial; citing your Honor to 17 CYC. 422, the case of VICKSBURG RAILWAY *vs.* WHITE.”

That the Court overruled defendant's objection above shown, and admitted in evidence the American Tables of Mortality, and that defendant then and there excepted thereto.

That the Court erred in allowing said Tables of Mortality admitted in evidence.

XXVI.

That thereafter and after the plaintiffs had rested and after the admission in evidence of said Tables of Mortality the defendant moved to strike out all the testimony in the case as to the incompetency of the man Yokum, and all of the testimony in the case as to his being intoxicated or seen intoxicated [168] on the ground that it is not shown in the case that Yokum was intoxicated on the day of the accident, and that it was not by reason of the intoxication of Yokum that no proper inspection of the face of the drift was had, and that it is not shown that he had at any time on that day inspected the face in question, and that it is not shown that such evidence tended to prove the negligence or the incompetency

or the impairment of the ability of Yokum, and that it is not shown that it was by reason of Yokum's drinking habits that he was careless or unfit or ever at any time overlooked a "missed hole," and on the ground that it did not appear that Yokum had had anything to do with the work of inspecting the drift or face in which the accident occurred, and that it was not shown that a "missed shot" had been exploded, which caused the accident and injuries complained of.

That the Court denied said motion to strike out the evidence relating to said Yokum and as to his intoxication and incompetency, to which ruling the defendant then and there excepted.

That the Court erred in denying said motion to strike out said testimony.

XXVII.

That thereafter defendant made its motion for a nonsuit, on the grounds that the plaintiff had failed to substantiate the allegations of negligence in this case, upon the ground that the evidence fails to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; upon the further ground that it did not appear from the evidence in the case that the defendant negligently or carelessly omitted or failed to furnish a safe place in which to perform the work; upon the further ground that there is no evidence in the case that the [169] "missed-shot" man Yokum was habitually intoxicated, or that his services were rendered inefficient by reason of any intoxication upon his part, or that the defendant knew or

had reason to know of his habits of intoxication; on the further ground that it is not shown in the evidence that Yokum had anything to do with the inspection of the particular face in which the accident and injury complained of occurred.

That the Court denied said motion for a nonsuit, to which ruling the defendant then and there excepted.

That the Court erred in denying defendant's motion for a nonsuit.

XXVIII.

Ira L. Greninger, being called as a witness on behalf of the defendant, the following question was then propounded to said witness on cross-examination:

“Mr. CANNON.—Q. Supposing, Mr. Greninger, that the missed-hole man in performing his duties and going his rounds, found a place where the muck had been entirely removed, would it be his duty to examine that face for missing holes?

A. So far as he was able, yes.”

That defendant then and there objected to this question and answer upon the ground that it did not appear whether the question is directed to a first examination the first time he saw this face after it was charged, or whether it was the second time; which objection the Court overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXIX.

The following question was then propounded to said witness:

“Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the [170] mine in the underground working of that mine? A. No, sir.”

That defendant objected to said question and answer on the ground that it was immaterial and not cross-examination, and that said objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXX.

That the following question was then propounded to said witness:

“Q. To what shift boss did you ever give any instructions or directions that the ‘missed-hole’ man was only hired for protection to inexperienced men.

“A. My giving instructions to three or four hundred men at the same time having that many under me, I cannot call to mind any one instance or any instance by itself.”

That defendant objected to this question and answer on the ground that it is not in itself an instruction, is incompetent, irrelevant and immaterial, and not cross-examination.

That said objection was overruled by the Court and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question. [171]

XXXI.

Christa B. Hall, being called as a witness on behalf of defendant, the following question was then propounded to said witness:

“Mr. CANNON.—Q. And did you not say to Mr. Greninger that you did not want to discharge him because they would give you an Italian, or some one who could not speak English, and you would have to go with him from place to place in the mine and show him what to do and that would make you back-track on your work? Did you not say that?

A. Not to Mr. Greninger.”

That defendant objected to this question and answer on the grounds that there was no foundation laid for it and that while Mr. Greninger was on the stand, no such testimony was elicited, which objection was overruled and defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXII.

The following question was then propounded to said witness.

“Q. Then to whom?

A. I might have said it. I don't remember.”

Defendant objected to this question and answer as incompetent, irrelevant and immaterial and not cross-examination, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIII.

The following question was then propounded to said witness:

“Q. Have you not said to them in the presence of those three boys, leaving out Fred, in the presence of Lawrence Whitsett and Enos Wall, have you not said during this trial in San Francisco here that they wanted you to discharge Yokum because of his drinking [172] habits and you did not want to discharge him because they would give you an Italian or some one who could not speak English and you would have to go with the Italian and show him the things he would have to do and he would make you back-track on your way, did you say that?

A. No, sir. Not in Frisco. I never said anything to Lawrence or Wall about it.”

That defendant objected to this question and answer as irrelevant and incompetent, no proper foundation laid, and not cross-examination, and that the time, place and persons present were not specified, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIV.

The following question was then propounded to said witness:

“Q. Did you say, what I have stated, to Lawrence or to Wall or to both of them anywhere else than in Frisco?

A. Not that I remember.”

Defendant objected to this question on the ground that it is irrelevant and incompetent, no proper foundation laid, and not cross-examination, and that the time, place and persons present were not specified, which objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXV.

The following question was then propounded to said witness:

“Q. Did you not tell Enos Wall in the same conversation I have already mentioned in San Francisco since this trial started that Yokum was in the habit of hiding away from you in the mine, or words to that effect? A. I did not.”

[173]

That defendant objected to this question and answer on the ground that it was incompetent, irrelevant and not cross-examination, and no proper foundation laid, time, place or persons present not being specified, which objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVI.

The following question was then propounded to said witness:

“Q. Did you not, between eight and ten on the night of the accident, take Frank to some other part of the mine to show him where to go to work after finishing the other two holes

or two holes and the part of a hole that was left to be done in that round? A. Fred."

Defendant objected to this question and answer as not cross-examination, which objection was overruled, and the defendant then and there accepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVII.

The following questions were then propounded to said witness:

"Q. Is it not a fact that Yokum was discharged within a week after this accident?

Mr. WILSON.—I object to that as immaterial.

The COURT.—The objection is overruled.

Mr. CANNON.—Q. Is that not a fact?

A. Yokum was discharged afterwards.

Q. Almost immediately after the accident?

A. He went on the other shift."

Defendant objected to these questions and answers on the ground that it was immaterial, and that the proper way to go at the matter was to ask the witness when Yokum was discharged, which [174] objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXVIII.

The following question was then propounded to said witness:

“Q. You put him out from your shift on to the other shift?

A. I had orders from the other boss.”

Defendant objected to this question and answer as immaterial, irrelevant, and not cross-examination.

The objection was overruled, and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XXXIX.

The following question was then propounded to said witness:

“Q. And after he got into the other shift, Greninger discharged him?

A. That is what Yokum told me.”

Defendant objected to this question and answer as immaterial, irrelevant and not cross-examination.

The objection was overruled and the defendant then and there excepted thereto.

That the Court erred in allowing said witness to answer said question.

XL.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instructions (the same being numbered 1 of the instructions requested by the defendant as above set forth):

“You are instructed by the Court that on the evidence and under the law, you will return a verdict in this case for the [175] defendant.”

Which request was refused, to which ruling the

defendant then and there excepted and now assigns the same as ERROR NO. 40.

That the Court erred in refusing to give said instruction to the jury. [176]

XLI.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the instructions requested by the defendant as above set forth):

“The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions, if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as ERROR NO. 41.

That the Court erred in refusing to give said instruction to the jury.

XLII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same be-

ing numbered 5 of the instructions requested by the defendant as above set forth):

“If you find from the evidence in this case that the accident complained of was such as could, by no reasonable possibility have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 42. [177]

That the Court erred in refusing to give said instruction to the jury.

XLIII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 6 of the instructions requested by the defendant as above set forth):

“In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time of the accident, the defendant was negligent in failing to anticipate and provide against the occurrence? The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which, it may appear after the accident,

would have avoided it. The requirement is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily prudent persons in the same situation prior to the accident.”

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 43.

That the Court erred in refusing to give said instruction to the jury.

XLIV.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the [178] jury the following instruction (the same being numbered 8 of the instructions requested by the defendant as above set forth):

“I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses.”

Which request was denied, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 44.

That the Court erred in refusing to give the said

instruction to the jury. [179]

XLV.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 9 of the instructions requested by the defendant as above set forth):

“It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers.”

Which request was refused, to which ruling the defendant then and there excepted and now assigned the same as ERROR NO. 45.

That the Court erred in refusing to give said instruction to the jury.

XLVI.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 12 of the instructions requested by the defendant as above set forth):

“The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged in extremely dangerous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations, and I charge you that the occupation of a miner is extremely dangerous, and that an employee engaged in mining is required to use every great precaution to [180] avoid an injury. A minor should be vigilant and careful in his own behalf and should use a degree of care proportioned to the degree of danger in the ordinary discharge of his duties. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation, and which a reasonably prudent person would use under like circumstances.”

Which request was refused, to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 46.

That the Court erred in refusing to give said instruction to the jury.

XLVII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same be-

ing numbered 25 of the instructions requested by the defendant as above set forth):

“Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a ‘two-edged sword’ and destroy the plaintiff’s right of recovery, because, if the employee knew, or should have known, of his coemployee’s incompetency, and neglected to call his employer’s attention thereto, he is treated as being guilty of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer’s part may have the same result as to the injured employee.”

Which request was refused, to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 47.

That the Court erred in refusing to give said instruction to the jury.

XLVIII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following [181] instruction (the same being numbered 26 of the instructions requested by the defendant as above set forth):

“If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of in-

toxicants, then I charge you that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become practically impaired, or that he was intoxicated at the time that he made an inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and of his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without contributory negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect missed shots, and if you further find that it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment by the defendant of said Yokum, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and

that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the defendant.

“In the case brought by Reardon, for the death of Frank [182] Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective or of the deceased in that case, then your verdict must be for the defendant.”

Which request was refused, to which ruling the defendant then and there excepted, and now assigns the same as ERROR NO. 48.

That the Court erred in refusing to give said instruction to the jury.

XLIX.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 31 of the instructions requested by the defendant as above set forth):

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident

complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as ERROR NO. 49.

That the Court erred in refusing to give said instruction to the jury. [183]

L.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 32 of the additional instructions requested by the defendant as above set forth):

"If you find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant's mine, where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise

of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted and now assigns the same as ERROR NO. 50.

That the Court erred in refusing to give said instruction to the jury.

LI.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 2 of the additional instructions requested by the defendant as above set forth):

"If, upon a consideration of all the evidence in the case of Reardon, you should reach the conclusion that the plaintiff is entitled to your verdict, you must not arbitrarily [184] award him any amount within the sum demanded in the complaint, but the amount awarded by you must be such an amount only as will be a reasonable compensation to the father and mother of the deceased for the actual pecuniary loss sustained by them through the death of Frank Whitsett. In other words, in the event of your finding for the plaintiff, your verdict must be restricted in this case to that amount ^{settled} which the evidence shows that the deceased would have earned, and, after paying his own expenses for his food, lodging, clothing, and the necessary and ordinary costs of living,

would have given or turned over to his father and mother for their own use. The law measures the injury or loss sustained by the father and mother in a case of this kind in dollars and cents. In other words, the damages must be simply remunerative, and that remuneration must be restricted to that sum of money that will amount to the reasonable expectation that the father and mother had of pecuniary, or money, benefit arising from the continuance in life of the person who was killed. The question is, what would the father and mother of the deceased, in all reasonable probability, have received pecuniarily by the continuance in life of the deceased? That is the question for you to determine in assessing damages in this case, should you determine that plaintiff is entitled to any damages whatsoever; and in passing upon the question of the amount, you are not allowed to speculate or indulge in presumptions or conjecture not warranted by the evidence, but you must determine the amount of damages solely by the evidence introduced before you in this case. If you are not able to determine from the evidence that the father and mother of the deceased have suffered a pecuniary injury or loss in the death of Frank Whitsett, then it becomes your duty and you must return a verdict for the defendant."

Which request was refused, and to which ruling the [185] defendant then and there excepted and now assigns the same as ERROR NO. 51.

That the Court erred in refusing to give said instruction to the jury.

LII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 4 of the additional instructions requested by the defendant, as above set forth):

“Nothing can be recovered in this action for any pain or suffering or injuries or damages sustained by the deceased Frank Whitsett.”

Which request was refused, and to which ruling the defendant then and there excepted, and now assigns the same as ERROR NO. 52.

That the Court erred in refusing to give said instruction to the jury. [186]

LIII.

On the close of the testimony and before the jury retired for deliberation, the Court gave its certain instructions to the jury, and when said instructions of the Court were so given to the jury, and before the jury was retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

“In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a ‘missed-hole man,’ and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the suc-

ceeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck-tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 53.

That the Court erred in giving said instruction to the jury.

LIV.

When said instructions were given to the jury, and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

"This obligation imposed upon an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger to the employee [187] may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of his employment it is made the duty of the employee

to inspect it for himself, and if the employer fails to do so and in consequence thereof his employee, while engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without fault on the part of the employee, the employer is liable to the employee for such injuries."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 52.

That the Court erred in giving said instruction to the jury.

LV.

When said instructions were given to the jury and before the jury retired for deliberation, the defendant duly excepted to the action of the Court in instructing the jury as follows:

"A servant does not assume risks resulting from the master's failure to so furnish a safe place to work, whether the performance of that duty is assumed by the master or is delegated to another. In other words, a servant, in the absence of agreement to the contrary, had the right to look to his employer for the furnishing of a safe place to work, and if the latter, instead of discharging that duty himself, sees fit to delegate it to another servant, he does not thereby alter the measure of his own obligation."

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 53.

That the Court erred in giving said instruction to the jury.

LVI.

When said instructions were given to the jury, and before the jury retired for deliberation, the defendant duly excepted to the [188] action of the Court in instructing the jury as follows:

“It is the duty of the master to use reasonable and ordinary care in furnishing a safe place for his employee in which to work, and whatever risk the employee assumes in carrying in the master’s business will not exempt the master from that duty.”

Upon the ground that the same is contrary to law, and which action of the Court in giving said instruction, defendant now assigns as ERROR NO. 54.

That the Court erred in giving said instruction to the jury.

LVII.

That said Court erred in overruling and denying the petition of the defendant for a new trial, which is as follows: [189]

(Title of Court and Cause.)

NOTICE.

To the Plaintiff in the Above-entitled Action, to William M. Cannon, Esq., and C. S. Jackson, Esq., His Attorneys:

You and each of you will please take notice that there is served herewith a copy of the petition of the defendant for a new trial in the above-entitled action, and that said defendant will move the Court

to grant a new trial upon the grounds set forth in said petition.

Dated July 5th, 1912.

C. H. WILSON,
CHICKERING & GREGORY,
Attorneys for Defendant.

(Title of Court and Cause.)

PETITION FOR A NEW TRIAL.

To the Honorable, the District Court of the United States, in and for the Northern District of California, Second Division:

The defendant in the above-entitled action hereby petitions for a new trial therein upon the following grounds:

1st: Irregularity in the proceedings of the jury by which the defendant was prevented from having a fair trial.

2d: Misconduct of the jury.

3d: Accident or surprise which ordinary prudence could not have guarded against.

4th: Excessive damages appearing to have been given under the influence of passion or prejudice.

5th: Insufficiency of the evidence to justify the verdict.

6th: That the verdict is against the law.

7th: Errors in law occurring at the trial.

The defendant hereby specifies the following particulars wherein the evidence is insufficient to justify the verdict: [190]

1st: That the evidence does not show any negligence on the part of the defendant contributing

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proximately as a cause to the accident and injury complained of.

2d: That the evidence clearly shows that the accident and injury complained of were proximately caused by the negligence of Frank Whitsett.

3d: That the evidence clearly shows that the accident and injury complained of were proximately caused by the negligence of Fred Whitsett, a co-employee of the plaintiff.

4th: That the evidence clearly shows that the deceased Frank Whitsett assumed all risk of injury from unexploded blasts or missed shots while working in the mine of this defendant.

5th: That the evidence clearly shows that the damages awarded to the plaintiff are excessive.

SPECIFICATION OF PARTICULARS IN WHICH THE VERDICT IS AGAINST THE LAW.

1st: That the verdict is against the law in each and every and all of the particulars in which it is herein specified that the evidence is insufficient to justify the verdict.

2d: That the verdict is against the law, inasmuch as there is no evidence of any negligence on the part of the defendant contributing as a proximate cause to the accident and injury complained of by the plaintiff.

SPECIFICATION OF ERRORS OF LAW.

1st: It was error for the trial Court to permit counsel for the plaintiff to state in the presence of the jury that the defendant in this case was insured

against liability for the accident and injury complained of by the plaintiff, and that this action is defended by an accident insurance company. [191]

2d: It was error for the trial Court to fail and neglect to swear the jury to try this case according to the law.

3d: It was error for the trial Court to overrule defendant's objection to the question: "How was he taken to the hospital?" propounded to the witness Lawrence Whitsett.

4th: It was error for the trial Court to overrule the objection of the defendant to the following question, to wit: "What was the financial condition of your parents at the time of the death of the one brother and the injury to the other?" propounded to the witness Lawrence Whitsett.

5th: It was error for the trial Court to deny defendant's motion to strike out the answer to the following question propounded to the witness Lawrence Whitsett: "State if you can where he would go," said answer being, "He would go to different cross-cuts and places thru the mine; presumably that is his duty." And also in overruling defendant's objection to the following question propounded to the same witness: "State what the practice was, Mr. Whitsett, with reference to what the men did in going back to work day by day, and where they would go to work."

6th: It was error for the trial Court to overrule defendant's objection to the question propounded to the witness Wall, as follows: "What kind of a wagon did they take him to the hospital in?"

7th: It was error for the trial Court to overrule defendant's objection to the question propounded to the witness, Ed Whitsett, as follows: "Q. What appears to be his mental condition now with respect to memory and his mentality generally as compared with what he was before the accident?"

8th: It was error for the trial Court to overrule defendant's objection to the following question propounded to the witness Fred Whitsett: "Did you belong to an organization which [192] entitled you to such treatment at the hospital?"

9th: It was error for the trial Court to overrule defendant's objection and receive in evidence on behalf of plaintiff the American Tables of Mortality.

10th: It was error for the trial Court to deny defendant's motion to strike out all of the testimony as to the incompetency of the man Yokum and of all of the testimony as to his being intoxicated or being seen intoxicated.

11th: It was error for the trial Court to overrule defendant's motion for a nonsuit.

12th: It was error for the trial Court to overrule the objection of the defendant to the following questions propounded to the witness Greninger, to wit: "Q. Your superiors gave no direction, made no written instructions or rules of any character for the safety of the mine in the underground working of that mine?" And, "Q. To what shift bosses did you ever give any instructions or directions that the 'missed-hole' man was hired only for the protection to inexperienced men?"

13: It was error for the trial Court to overrule

defendant's objection to the following question propounded to the witness Hall, to wit: "Q. Have you not said to them in the presence of those three boys, leaving out Fred, in the presence of Lawrence Whitsett and Enos Wall; have you not said during this trial here in San Francisco that they wanted you to fire Yokum because of his drinking habits, and you did not want to discharge him because they would give you an Italian or someone who could not speak English and you would have to go with the Italian and show him the things he would have to do and he would make you back-track on your work; did you say that?"

14th: It was error for the trial Court to overrule [193] the defendant's objection to the following questions propounded to the witness Hall, to wit: "Q. State whether or not after this accident you transferred Yokum from your shift to the other shift?" And, "Q. And after he got in the other shift Greninger discharged him?"

15th: It was error for the trial Court to charge the jury as follows, to wit:

"This obligation imposed on an employer to use reasonable care in furnishing to his employee a safe place to work, and to keep that place reasonably safe, requires that where an employer places his employee at work in a place where danger may be reasonably apprehended, and such danger may be avoided by reasonable and proper inspection of such premises, it is the duty of the employer to provide for such inspection, unless by the terms of his employment it

is made the duty of the employee to inspect it for himself, and if the employer fails to do so and in consequence thereof his employee engaged in the performance of his work, in reliance upon the master performing his duty in that respect, is injured in consequence of such neglect, and without any fault on the part of the employee, the employer is liable to the employee for such injuries."

16th: It was error for the trial Court to refuse to charge the jury according to defendant's first request as follows:

"You are instructed by the Court that on the evidence and under the *law will* return a verdict in this case for the defendant."

17th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

"The mere fact of the happening of the accident in this case carries with it no presumption of negligence on the part [194] of the defendant. The negligence of the defendant in this case is an affirmative fact for the plaintiff to clearly and certainly establish by a preponderance of evidence. The mere fact that the accident could have been avoided or prevented by the exercise of certain precautions if that be true, is not sufficient in itself to establish that the accident complained of was caused by the negligence of the defendant."

18th: It was error for the trial Court to refuse to

charge the jury according to the defendant's request as follows, to wit:

"If you find from the evidence in this case that the accident in this case complained of was such as could, by no reasonable possibility have been foreseen, and which no reasonable person could have anticipated,—in other words, that it was an inevitable accident,—then I charge you that your verdict must be for the defendant."

19th: It was error for the trial Court to refuse to charge the jury according to defendant's request as follows, to wit:

"In determining in this case whether or not the defendant was negligent, the proper inquiry for you to make is *not* whether the accident might have been avoided if the defendant had anticipated its occurrence, but whether, taking the circumstances as they existed at the time of the accident, the defendant was negligent in failing to anticipate and provide against the occurrence. The duty imposed does not require the use of every possible precaution to avoid injury to plaintiff, nor of any particular means which, it may appear after the accident, would have avoided it. The requirement is only to use such reasonable precaution to prevent accidents as would have been adopted by ordinarily [195] prudent persons in the same situation prior to the accident."

20th: It was error for the trial Court to refuse to charge the jury according to defendant's request, as follows, to wit:

“I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not been previously prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses.”

21st: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

“It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employer knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such places the employee himself in the progress of the work is under as great an obligation as is his employer to be on the lookout for such dangers.”

22d: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

“The standard of due care to be exercised by an employee is that degree that a prudent person would exercise for his own [196] safety, but the necessity for greater or less care to avoid injury necessarily varies according to the hazards of the particular employment. Those engaged in extremely hazardous employments are required to adopt more precautions for their own safety than those engaged in less hazardous vocations, and I charge you that the occupation of a miner is extremely dangerous and that an employee engaged in mining is required to use very great precaution to avoid an injury. A miner should be vigilant and careful in his own behalf and should use a degree of care proportioned to the degree of danger in the ordinary discharge of his duty. In other words, he should exercise for his own protection that degree of care which is commensurate with the character of his occupation and which a reasonably prudent person would use under like circumstances.”

23d: It was error for the trial Court to refuse to instruct the jury according to the defendant's request as follows, to wit:

“Again, while the evidence may tend to charge the employer with notice of incompetency, it may also become a ‘two-edged’ sword and destroy the plaintiff's right of a recovery, because, if the employee knew, or should have known, of his coemployee's incompetency, and failed to call his employer's attention thereto, he

is guilty of such contributory negligence by remaining in the employment, as prevents any recovery by him, and the very facts that tend to show knowledge on the employer's part may have the same result as to the injured employee."

24th: It was error for the trial Court to refuse to instruct the jury according to defendant's request as follows, to wit:

"If you find from the evidence in this case that the defendant employed a man by the name of Yokum for the purpose of [197] detecting missed shots after blasts in the faces of the drifts and cross-cuts in its mine, and if you further find that said Yokum was addicted to the use of intoxicants, then I charge that before you can find a verdict in favor of Fred Whitsett and against the defendant on the ground that the defendant was negligent in employing or continuing in its employ said Yokum, you must further find from the evidence that Yokum was so addicted to the use of intoxicants that his ability to do his work had become permanently impaired, or that he was intoxicated at the time he made the inspection of the face of the cross-cut where the accident occurred, and in such event you must further find that the defendant knew, or by the exercise of reasonable care should have known, of the habits of Yokum and his incompetence, and you must further find that the accident complained of was proximately caused by the incompetence of said Yokum and without con-

tributary negligence on the part of Fred Whitsett. If you should find from the evidence that Yokum was an incompetent employee employed by the defendant to detect miss shots, and if you *further that* it was also the duty of Fred Whitsett to examine for himself and determine whether or not there were missed shots, then and in that event I charge you that the plaintiff was not relieved from his duty to make such examination by the employment of said Yokum by the defendant, or by the fact that said Yokum had examined the face of the cross-cut where the accident occurred, prior to the time that said Fred Whitsett began work there, and that in such event it was the duty of Fred Whitsett to discover or detect the missed shot that caused the accident, and, failing in this particular, your verdict must be for the defendant.

“In the case brought by Reardon, for the death of [198] Frank Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed shot detective or of the deceased in that case, then your verdict must be for the defendant.”

25th: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant.”

26th: It was error for the trial Court to refuse to charge the jury according to the defendant’s request as follows, to wit:

“If you should find in this case that it was the duty of Fred Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Fred Whitsett, in the exercise of ordinary care, or if you [199] find that said unexploded blast was so concealed that it could not have been discovered by said Fred Whitsett, by the exercise of ordinary care, then and in that event I charge you neither plaintiff can recover in these

actions and that your verdict must be for the defendant.”

27th: It was error for the trial Court to refuse to charge the jury according to the defendant’s request as follows, to wit:

“If, upon a consideration of all the evidence in the case of Reardon, you should reach the conclusion that the plaintiff is entitled to your verdict, you must not arbitrarily award him any amount within the sum demanded in the complaint, but the amount awarded by you must be such an amount only as will be a reasonable compensation to the father and mother of the deceased for the actual pecuniary loss sustained by them through the death of Frank Whitsett. In other words, in the event of your finding for the plaintiff, your verdict must be restricted in this case to that amount which the evidence shows the deceased would have earned, and after paying for his own expenses for his food, lodging, clothing and the necessary and ordinary costs of living, would have given or turned over to his father and mother for their own use. The law measures the injury or loss sustained by the father and mother in cases of this kind in dollars and cents. In other words, the damages must be simply remunerative, and that remuneration must be restricted to that sum of money that will amount to the reasonable expectation that the father and mother of pecuniary, or money, benefit arising from the continuance in life of the person who was killed.

The question is, what would the father and mother of the deceased, in all reasonable probability, have received pecuniarily by the continuance in life of the deceased? That is the [200] question for you to determine in assessing the damages in this case, should you determine that plaintiff is entitled to any damages whatsoever; and in passing upon the question of the amount, you are not allowed to speculate or indulge in presumptions or conjecture not warranted by the evidence, but you must determine the amount of damages solely by the evidence introduced before you in this case. If you are not able to determine from the evidence that the father and mother have suffered a pecuniary injury or loss in the death of Frank Whitsett, then it becomes your duty and you must return a verdict for the defendant."

28th: It was error for the trial Court to refuse to charge the jury according to the defendant's request as follows, to wit:

"Nothing can be recovered in this action for any pain or suffering or injuries or damages sustained by the deceased Frank Whitsett."

Said petition will be heard upon the pleadings and papers on file and upon the minutes of the Court and any notes and memoranda which may have been kept by the Judge, and also the reporter's transcript of his shorthand notes.

Dated this 5th day of July, 1912.

C. H. WILSON,
CHICKERING & GREGORY,
Attorneys for Defendant. [201]

Which action of said Court in overruling and denying defendant's petition for a new trial the defendant now assigns as ERROR NO. 57.

WHEREFORE, the said defendant, Balaklala Consolidated Copper Company, a corporation, prays that the judgment of the District Court of the United States, in and for the Northern District of California, Second Division, entered herein in favor of the plaintiff and against the defendant be reversed and that the said District Court of the United States, in and for the Northern District of California, Second Division, be directed to grant a new trial of said cause.

Dated this 22d day of November, 1912.

C. H. WILSON,

CHICKERING & GREGORY,

Attorneys for Defendant.

Due service of the within assignment of errors and receipt of a copy thereof is hereby admitted this 22d day of November, 1912.

C. J. JACKSON and

WM. M. CANNON,

Attorneys for Plaintiff.

[Endorsed]: Filed Nov. 22d, 1912. W. B. Mal-
ing, Clerk. [202]

*In the District Court of the United States in and
for the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,
Defendants.

**Order Allowing Writ of Error and Fixing Amount
of Supersedeas Bond.**

Upon motion of C. H. Wilson, attorney for defendant herein, made this 22d day of November, 1912, and upon the filing of the said defendant's petition for the allowance of a writ of error intended to be urged by defendant, and upon the filing of the assignments of error by defendant;

IT IS ORDERED, and the Court hereby.

ORDERS, that a Writ of Error as prayed for in said petition be allowed and that the amount of the *supersedeas* bond to be given by defendant and upon said writ of error be, and the same is hereby fixed at the sum of Five Thousand Dollars (\$5,000.00), and that upon the giving of said bond all further proceedings in this Court be suspended, stayed and superseded pending the determination of said writ of error by the United States Circuit Court of Appeal, in and for the Ninth Circuit.

Dated this 22d day of November, 1912.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Nov. 22, 1912. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [203]

*In the District Court of the United States in and
for the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,
Defendants.

Supersedeas Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS:
That we, Balaklala Consolidated Copper Company,
a private corporation, defendant above named, as
principal, and The Title Guaranty & Surety Com-
pany, a corporation created, organized and existing
under and by virtue of the laws of the Commonwealth
of Pennsylvania, as surety, are held and firmly bound
unto J. E. Reardon, as Administrator of the Estate
of Frank Whitsett, deceased, plaintiff above named,
in the sum of Five Thousand Dollars (\$5,000.00), to
be paid to said J. E. Reardon, as Administrator of
the Estate of Frank Whitsett, deceased, his executors
or administrators, to which payment well and truly

to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents:

Sealed with our seals and dated this 22d day of November, 1912.

WHEREAS, the above-named defendant, Balaklala Consolidated Copper Company, a corporation, has sued out a writ of error to the [204] United States Circuit Court of Appeal, in and for the Ninth Circuit, to reverse the judgment entered in the above-entitled cause by the District Court of the United States, in and for the Northern District of California, Second Division, in favor of the above-named plaintiff and against the defendant therein for the sum of Three Thousand Five Hundred Dollars (\$3,500.00), interest and costs.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION is such that if the above-named Balaklala Consolidated Copper Company, a corporation, shall prosecute said writ of error to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void, otherwise to be and remain in full force and effect.

IN WITNESS WHEREOF, the said Balaklala Consolidated Copper Company, a corporation, and The Title Guaranty & Surety Company, a corporation created, organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania have caused these presents to be executed this

— day of November, 1912.

BALAKLALA CONSOLIDATED COPPER
COMPANY.

By CHICKERING & GREGORY,

Its Attorney.

THE TITLE GUARANTY & SURETY
COMPANY.

[Seal]

By C. F. MANNESS,

Attorney in Fact.

Approved:

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Nov. 22, 1912. W. B. Maling,
Clerk. By J. A. Schaertzer, Deputy Clerk. [205]

[Certificate of Clerk U. S. District Court to
Transcript of Record, etc.]

*In the District Court of the United States in and
for the Northern District of California, Second
Division.*

No. 15,144.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,

Plaintiff,

vs.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, JOHN DOE and
RICHARD ROE,

Defendants.

I, Walter B. Maling, Clerk of the District Court
of the United States, for the Northern District of

Administrator of the Estate of Frank Whitsett, deceased, defendant in error, a manifest error hath happened to the great damage of the said Balaklala Consolidated Copper Company, a corporation, plaintiff in error, as by its complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, in the State of California, on the 21st day of December next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, [207] the 23d day of November, in the year of our Lord one thousand nine hundred and twelve.

[Seal] W. B. MALING,
Clerk of the District Court of the United States, in
and for the Northern District of California.

Allowed by:

WM. C. VAN FLEET,
Judge. [208]

Receipt of a copy of the within is hereby admitted this 23d day of November, 1912.

W. M. CANNON and

C. S. JACKSON,

Attorneys for Defendant in Error.

[Answer to Writ of Error.]

The Answer of the Judges of the District Court of the United States for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Circuit Court of Appeals for the Ninth Circuit, within-mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

WALTER B. MALING,

Clerk.

[Endorsed]: No. 15,144. District Court of the United States, Northern District of California, Second Division. Balaklala Consolidated Copper Company, a Corporation, Plaintiff in Error, vs. J. E. Reardon, as Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Writ of Error. Filed Nov. 23, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [209]

Citation on Writ of Error [Original].

UNITED STATES OF AMERICA,—ss.

The President of the United States to J. E. Reardon,
Administrator of the Estate of Frank Whitsett,
Deceased, Greeting:

YOU ARE HEREBY CITED AND AD-
MONISHED to be and appear at a United States
Circuit Court of Appeals, for the Ninth Circuit, to
be holden at the City of San Francisco, in the State
of California, within thirty days from the date
hereof, pursuant to a writ of error filed in the Clerk's
office of the District Court of the United States, in
and for the Northern District of California, Second
Division, wherein Balaklala Consolidated Copper
Company, a corporation, is plaintiff in error, and you
are defendant in error, to show cause, if any there
be, why the judgment rendered against the said plain-
tiff in error as in the said writ of error mentioned,
should not be corrected, and why speedy justice
should not be done to the parties in this behalf.

WITNESS the Honorable WILLIAM C. VAN
FLEET, United States District Judge, for the
Northern District of California, this 22d day of No-
vember, A. D. 1912.

WM. C. VAN FLEET,
United States District Judge. [210]

Receipt of a copy of the within Citation is hereby
admitted this 22d day of November, 1912.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Plaintiff.

[Endorsed]: No. 15,144. District Court of United States, Northern District of California, Second Division. Balaklala Consolidated Copper Company, a Corporation, et al., Plaintiff in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Citation on Writ of Error. Filed Nov. 23, 1912. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [211]

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, Plaintiff in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Northern District of California, Second Division.

Received and filed May 9, 1914.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

In the United States Circuit Court of Appeals, Ninth Circuit.

No. —.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time to [January 20, 1913, to] File Record Thereof and Docket Cause.

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including January 20, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated December 20, 1912.

WM. C. VAN FLEET,

United States District Judge for the Northern District of California.

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Jan. 20, 1913, to File Record Thereof and to Docket Case. Filed Dec. 19, 1912. F. D. Monckton, Clerk.

*In the United States District Court, for the Northern
District of California, Second Division.*

No. 15,144.

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, as Administrator of the Estate of
FRANK WHITSETT, Deceased,

Defendant in Error.

**Order Extending Time to [February 19, 1913, to]
File Record Thereof and Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error in the above-entitled cause may have to and including February 19, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated January 18, 1913.

WM. W. MORROW,
Judge.

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Feb. 19, 1913, to File Record Thereof and to Docket Case. Filed Jan. 18, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, as Administrator of the Estate of
FRANK WHITSETT, Deceased,

Defendant in Error.

**Order Extending Time to [March 20, 1913, to] File
Record Thereof and Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error may have to and including March 20, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

WM. W. MORROW,
United States Circuit Judge.

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to Mar. 20, 1913, to File Record Thereof and to Docket Case. Filed Feb. 19, 1913. F. D. Monekton, Clerk.

*In the United States Circuit Court of Appeals, for
the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation,

Plaintiff in Error,

vs.

J. E. REARDON, as Administrator of the Estate of
FRANK WHITSETT, Deceased,

Defendant in Error.

**Order Extending Time to [April 18, 1913, to] File
Record Thereof and Docket Cause.**

Good cause appearing therefor, it is ordered that the plaintiff in error have to and including the 18th day of April, 1913, within which to file its record on writ of error and to docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated March 19, 1913.

WM. C. VAN FLEET,

Judge.

[Endorsed]: No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Rule 16 Enlarging Time to April 18, 1913, to File Record Thereof and to Docket Case. Filed Mar. 19, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,

Defendant in Error.

**Order Extending Time to [July 17, 1913, to] File
Record Thereof and Docket Cause.**

Good cause therefor appearing, it is hereby ordered that the plaintiffs in error may have to and including the 17th day of July, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

WM. C. VAN FLEET,

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and

WM. M. CANNON,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error, Order Extending Time. Filed Apr. 18, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

**BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,**

Plaintiffs in Error,

vs.

**J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,**

Defendants in Error.

**Order Extending Time [to September 17, 1913, to
File Record Thereof and Docket Cause].**

Good cause therefor appearing, it is hereby ordered that the plaintiffs in error may have to and including the 17th day of September, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated this 17 day of July, 1913.

WM. W. MORROW,

U. S. Circuit Judge.

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and

W. M. CANNON,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. Dept. No. ——. In the United States Circuit Court of Appeals in and for the Ninth District. Balaklala Consolidated Copper Co., etc., et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator, etc., Defendant in Error. Order Ex-

tending Time. Filed Jul. 17, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Defendant in Error.

**Order Extending Time [to September 18, 1913, to
File Record Thereof and Docket Cause].**

Good cause Therefor appearing, it is hereby ordered, that the plaintiffs in error may have to and including the 18th day of September, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated at San Francisco, California, this 18th day of August, 1913.

WM. C. VAN FLEET,
Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals, for the Ninth Circuit. Balaklala Consolidated Copper Company, etc., et al., Plain-

tiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time to File Writ of Error and to Docket Cause. Filed Aug. 18, 1913. F. D. Monickton, Clerk.

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO.,
a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Defendant in Error.

**Order Extending Time [to October 20, 1913, to File
Record Thereof and Docket Cause].**

Good cause therefor appearing, it is hereby ordered that the plaintiffs in error may have to and including the 20th day of October, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated: September 17th, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. —. United States Circuit Court of Appeals, Ninth Circuit. Balaklala Consolidated Copper Company, etc., Plaintiff in Error, vs. J. E. Reardon, etc., Defendant in Error. Order Extending Time. Filed Sep. 8, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO.
a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,

Defendant in Error.

**Order Extending Time [to November 20, 1913, to
File Record Thereof and Docket Cause].**

Good cause appearing therefor, it is hereby ordered that the plaintiffs in error may have to and including the 20th day of November, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated: October 20th, 1913.

WM. C. VAN FLEET,

United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and

C. S. JACKSON,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc., et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Oct. 20, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO.,
a Corporation, et al.,

Plaintiffs in Error,
vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Defendant in Error.

**Order Extending Time [to December 20, 1913, to
File Record Thereof and Docket Cause].**

Good cause therefor appearing, it is hereby ordered, that the plaintiffs in error may have to and including the 20th day of December, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated this 19th day of November, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Nov. 20, 1913. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER CO.,
a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Defendant in Error.

**Order Extending Time [to December 27, 1913, to
File Record Thereof and Docket Cause].**

Good cause therefor appearing, it is hereby ordered, that the plaintiffs in error may have to and including the 27th day of December, 1913, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated this 20th day of December, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc., Plaintiff in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased. Defendant in Error. Order Extending Time. Filed Dec. 20, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO.,
a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Defendant in Error.

**Order Extending Time [to January 27, 1914, to File
Record Thereof and Docket Cause].**

Good cause therefor appearing, it is hereby ordered, that the plaintiffs in error may have to and including the 27th day of January, 1914, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated this 27th day of December, 1913.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and
C. S. JACKSON,
Attorneys for Defendant in Error.

[Endorsed]: No. 15,144. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Dec. 27, 1913. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER CO.,
a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Defendant in Error.

**Order Extending Time [to February 26, 1914, to File
Record Thereof and Docket Cause].**

Good cause therefor appearing, it is hereby

ORDERED, that the plaintiffs in error may have and they are hereby granted thirty (30) days from and after the 27th day of January, 1914, within which to file their record on writ of error and docket this cause with the clerk of the above-entitled court.

Dated this 27th day of January, 1914.

WM. C. VAN FLEET,

United States District Judge.

Defendant in Error hereby consents to the making of the above order.

C. S. JACKSON and

W. M. CANNON,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Co., etc. et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator, etc., Defendant in Error. Order Extending Time. Filed Jan. 27, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of FRANK WHITSETT, Deceased,

Defendant in Error.

Order Extending Time [to March 15, 1914, to File Record Thereof and Docket Cause].

Good cause appearing therefor, it is hereby ordered that the plaintiffs in error may have to and including the 15th day of March, 1914, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated February 26th, 1914.

M. T. DOOLING,

United States District Judge.

Defendant in error hereby consents to the making of the above order.

WM. M. CANNON and

C. S. JACKSON,

Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Feb. 26, 1914. F. D. Monckton, Clerk.

*In the United States Circuit Court of Appeals in
and for the Ninth Circuit.*

BALAKLALA CONSOLIDATED COPPER COM-
PANY, a Corporation, et al.,

Plaintiffs in Error,

vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,

Defendant in Error.

**Order Extending Time [to April 15, 1914, to File
Record Thereof and Docket Cause].**

Good cause appearing therefor, it is hereby ordered that the plaintiffs in error may have to and including the 15th day of April, 1914, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated March 16th, 1914.

WM. C. VAN FLEET,

United States District Judge.

Defendant in error hereby consents to the making of the above order.

W. M. CANNON and

C. S. JACKSON,

Attorneys for Defendant in Error.

[Endorsed]: In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Mar. 16, 1914. F. D. Monckton, Clerk.

In the United States Circuit Court of Appeals in and for the Ninth Circuit.

BALAKLALA CONSOLIDATED COPPER COMPANY, a Corporation, et al.,
Plaintiffs in Error,
vs.

J. E. REARDON, Administrator of the Estate of
FRANK WHITSETT, Deceased,
Defendant in Error.

**Order Extending Time [to May 10, 1914, to File
Record Thereof and Docket Cause].**

Good cause appearing therefor, it is hereby ordered, that the plaintiffs in error may have to and including the 10th day of May, 1914, within which to file their record on writ of error and to docket this cause with the clerk of the above-entitled court.

Dated April 10th, 1914.

WM. C. VAN FLEET,
United States District Judge.

Defendant in error hereby consents to the making of the above order.

C. S. JACKSON and
W. M. CANNON,
Attorneys for Defendant in Error.

[Endorsed]: No. ——. In the United States Circuit Court of Appeals in and for the Ninth Circuit. Balaklala Consolidated Copper Company, a Corporation, et al., Plaintiffs in Error, vs. J. E. Reardon, Administrator of the Estate of Frank Whitsett, Deceased, Defendant in Error. Order Extending Time. Filed Apr. 11, 1914. F. D. Monckton, Clerk.

No. 2420. United States Circuit Court of Appeals for the Ninth Circuit. Sixteen Orders Under Rule 16 Enlarging Time to May 10, 1914, to File Record Thereof and to Docket Case. Refiled May 9, 1914. F. D. Monckton, Clerk.

No. 2420

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER
COMPANY (a corporation),
Plaintiff in Error,

VS.

J. E. REARDON, Administrator of the
Estate of Frank Whitsett, Deceased,
Defendant in Error.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

C. H. WILSON,
Attorney for Plaintiff in Error.

Filed this.....day of September, 1914.

FRANK D. MONCKTON, Clerk.

By.....*Deputy Clerk.*

Filed

SEP 30 1914

No. 2420

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER
COMPANY (a corporation),
Plaintiff in Error,

VS.

J. E. REARDON, Administrator of the
Estate of Frank Whitsett, Deceased,
Defendant in Error.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

This is an action brought to recover damages for wrongful death. At the time of the death complained of, March 9th, 1909, the defendant corporation was engaged in the business of mining and operating a quartz mine situate in the County of Shasta, State of California.

The deceased and his twin brother, Fred Whitsett, were employed by the defendant to operate a

Burleigh drill in its mine. Frank, the deceased, was an experienced miner and was known as a machine man (Record, pp. 68, 87 and 88). Fred was a machine man's helper, or chuck tender (Record, p. 78), and had worked for the defendant as a miner during a period of six weeks prior to the accident (Record, p. 81). The Burleigh drill is a machine operated by compressed air that drills holes in rock or ore preparatory to blasting. The machine man operated the valve that let the compressed air into the machine and by means of a screw, turned by a crank, kept the point of the drill in contact with the rock or ore (Record, p. 83). The chuck tender was required to take a drill out of the chuck whenever necessary and put in another, and he was also required to pour water into the hole made by the drill while it was in operation (Record, p. 84). These two brothers changed about in their work from time to time, so that they alternately worked as drill man and chuck tender (Record, pp. 83, 84). At the time of the accident Fred was operating the drill and Frank was the chuck tender (Record, p. 79). Ordinarily, a round of a dozen holes was drilled, four at the top, four in the middle, and four at the bottom of the face of the drift or cross-cut, the bottom four being called lifters (Record, p. 81). When the drilling was completed the holes were filled with dynamite and there was a cap and fuse for each hole. As the men went off shift, the fuses were lighted and by the time the men had reached places of safety, the

explosion took place, blasting the rock out roughly in the shape of the drift or cross-cut (Record, p. 82). A month or more prior to the accident a drift or tunnel had been cut in the mine, and from this drift or tunnel a cross-cut was being made by the Whitsett brothers and their opposite shift at the time of the accident (Record, p. 90). In the face of the cross-cut one round of holes had been drilled and blasted, breaking the rock out to a depth of three or three and one-half feet. This first blast had taken place some time before the Whitsett brothers went to work at the cross-cut (Record, p. 87), and they were, therefore, engaged in drilling the second round of holes at the time of the accident (Record, pp. 107 and 110). The first work that the Whitsett brothers did at this place was on the night preceding the accident, when they drilled five holes. They then went off shift and in due time the day shift came on work—the defendant worked but two shifts in its mine. The drilling was continued by the day shift, so that when the Whitsett brothers went to work on the night shift following, there were but two holes and a part of a third yet to drill. These were the lifters (Record, p. 81). The Whitsett brothers began work on the uncompleted hole, and, as they were drilling the same, the drill struck and exploded a missed-shot or missed-hole, that is to say, a charge of dynamite that had not been exploded in the preceding blast. In this explosion Frank was killed and Fred was greatly injured. This action, as has been stated, is brought

to recover damages for the death of Frank. Fred maintains his separate action to recover damages for his injuries (see Record on Appeal in Case No. 2419, before this Court).

The complaint charges that the defendant "failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for the said Frank Whitsett to perform his said labor as aforesaid, and particularly in this:" And here follows a description of the accident and then the allegations that the presence of the unexploded blast was unknown to Frank Whitsett, but could have been discovered and known to the defendant by the use and exercise of ordinary care and diligence (Record, p. 29).

Defendant admits the accident and death, but denies the negligence, and denies that it could have discovered and known of the missed-shot.

The case was joined with that of Fred Whitsett for trial, both cases being tried before the same jury. This case resulted in a verdict in favor of the plaintiff and against the defendant in the sum of thirty-five hundred dollars (\$3500.00). Separate motions for new trial were duly made and denied, and separate writs of error to the Court below were duly obtained and both cases are now before this Court on writs of error. In the Court below the main issue was whether or not the accident was proximately caused by any negligence on the part of defendant, plain-

tiff contending that it was the duty of the defendant to exercise ordinary care to discover the missed-shot, while the latter insisted that under the circumstances there was no duty on its part to furnish deceased with a safe place in which to work, and that the duty of looking for and detecting the missed-shot rested on the deceased, and furthermore, that the missed-shot in this instance was so concealed that it was impossible by any ordinary or practicable method to discover the same.

Before this Court the plaintiff in error relies on the following

SPECIFICATIONS OF ERROR,

which are urged by it as grounds for the reversal of the judgment of the District Court:

I.

That the District Court erred in permitting counsel for the plaintiff to state, in the presence of the jury: "In this case, there is certain indemnity insurance against this kind of action, and the insurance company is defending through its own counsel, this action. Therefore, I have a right to inquire." And that counsel for plaintiff was guilty of misconduct in making said statement in the presence of the jury. That defendant objected to said statement and to the conduct of counsel in making said statement, which objection was overruled by the Court and the defendant then and there excepted thereto, which exception was duly allowed by the

Court, constituting the First Assignment of Error (Record, pp. 164, 165).

II.

That on May 15th, 1912, and while the jury was being empaneled in the above entitled action during the examination of N. S. Arnold, a talesman, on his *voir dire* by counsel for plaintiff, the following proceedings were had:

“Mr. CANNON. Q. Have you any connection, either as a stockholder or otherwise, with an indemnity company or organization for the purpose of insuring people against personal injuries?

Mr. WILSON. I object to that question as immaterial.

Mr. CANNON. I do not think it is immaterial. I would like to state why I ask the question.

The COURT. What is the reason?

Mr. CANNON. The reason is——

Mr. WILSON. I object to the reason being stated.

The COURT. I am asking for it.

Mr. CANNON. In this case there is certain indemnity insurance against this kind of action and the insurance company is defending, through its own counsel, this action. Therefore, I have a right to inquire.

Mr. WILSON. I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

Mr. WILSON. We now move that the jury be discharged on the ground that improper and foreign matter has come to the knowledge of the jury.

The COURT. The motion will be denied. I will instruct the jury to pay no attention to

the remark of counsel unless it should appear it is a pertinent fact."

That the Court erred in refusing to discharge the jury on motion of defendant's counsel, constituting the Second Assignment of Error (Record, pp. 165, 166).

III.

The following question was then propounded to said N. S. Arnold, a talesman, on his *voir dire*:

"Mr. CANNON. Q. Have you any connection, either as a stockholder or otherwise, with any indemnity company as I have described?

Mr. WILSON. We insist upon our objection.

The COURT. I overrule the objection.

Mr. WILSON. I will take an exception."

That the Court erred in permitting said question and in allowing counsel to bring before the jury notice and information of the fact that this action was defended by an indemnity company and that defendant was protected by indemnity insurance, constituting the Third Assignment of Error (Record, p. 166).

IV.

The following question was then propounded to the witness, Fred Whitsett:

"Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally?

A. They were very poor."

Defendant objected to this question and answer as irrelevant, incompetent and immaterial, not the proper proof of damages in the case, calling for the conclusion of the witness, and on the grounds shown in the California case of *Johnston v. Beadle*.

Objection was overruled and the defendant then and there excepted thereto.

That the court erred in allowing said witness to answer said question, constituting the Fourteenth Assignment of Error (Record, p. 171).

V.

That thereupon defendant made its motion for a nonsuit, as follows:

“Mr. WILSON. And in the Reardon case we move that an order of nonsuit be entered upon the ground that the plaintiff has failed to substantiate the allegations of negligence in this case. Further, upon the ground that the evidence fails to show any negligent act or omission on the part of the defendant proximately causing the accident and injury complained of; and further, upon the ground that it does not appear from the evidence in this case that the defendant negligently or carelessly omitted or failed to furnish the deceased, Frank Whitsett, with a safe place in which to perform his work.”

Constituting the Twenty-seventh Assignment of Error (Record, p. 86).

VI.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should

give to the jury the following instruction (the same being numbered 1 of the instructions requested by the defendant):

“You are instructed by the Court that on the evidence and under the law, you will return a verdict in this case for the defendant.”

Which request was refused, to which ruling the defendant then and there excepted.

That the Court erred in refusing to give such instruction, constituting the Fortieth Assignment of Error (Record, pp. 185, 186).

VII.

That the District Court erred in overruling and denying the petition of defendant for a new trial herein, to which ruling the defendant duly excepted.

That the Court erred in denying said petition for a new trial, constituting the Fifty-seventh Assignment of Error (Record, pp. 201-215).

VIII.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 31 of the instructions requested by the defendant):

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged

to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exercise of ordinary care, then and in that event I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant."

Which request was refused, and to which ruling the defendant then and there excepted, the error of the Court in refusing to so charge the jury constituting the Forty-ninth Assignment of Error (Record, pp. 193, 194).

IX.

On the close of the testimony and before the jury retired for deliberation, the Court gave its certain instructions to the jury, and when said instructions of the Court were so given to the jury, and before the jury was retired for deliberation the defendant duly excepted to the action of the Court in instructing the jury as follows:

"In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a 'missed-hole man', and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck-tender

regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself."

Upon the ground that the same is contrary to law.

That the error of the District Court in so charging the jury now constitutes the Fifty-third Assignment of Error (Record, p. 197).

X.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 26 of the instructions requested by the defendant):

"In the case brought by Reardon, for the death of Frank Whitsett, there is no charge in the complaint that the accident was proximately caused by the incompetence of Yokum or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective or of the deceased in that case, then your verdict must be for the defendant."

Which request was refused, to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the Forty-eighth Assignment of Error (Record, p. 193).

XI.

Prior to the argument to the jury the defendant duly requested in writing that the Court should give to the jury the following instruction (the same being numbered 8 of the instructions requested by the defendant):

“I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses.”

Which request was denied, and to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the Forty-fourth Assignment of Error (Record, p. 188).

XII.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instruction (the

same being numbered 9 of the instructions requested by the defendant):

“It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers.”

Which request was refused, to which ruling the defendant then and there excepted.

That the District Court erred in refusing to so instruct the jury, now constituting the Forty-fifth Assignment of Error (Record, p. 189).

Argument.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

These specifications of error pertaining to the alleged misconduct of counsel for plaintiff in stating in the presence of the jury that this action is defended by an insurance company, may be considered together.

The record shows that during the examination by Mr. Cannon of N. S. Arnold, a talesman, on his *voir dire*, and who subsequently sat as a juror in this cause, the following proceedings were had:

“Q. Have you any connection either as a stockholder or otherwise with an indemnity company, or organization for the purpose of insuring people against personal injuries?

Mr. WILSON. I object to that question as immaterial.

Mr. CANNON. I do not think that it is immaterial. I would like to state why I asked the question.

The COURT. What is the reason?

Mr. CANNON. The reason is——

Mr. WILSON. I object to the reason being stated.

The COURT. I am asking for it.

Mr. CANNON. In this case there is certain indemnity insurance against this kind of accident, and the insurance company is defending, through its own counsel, this action; therefore, I have a right to inquire——

Mr. WILSON. I object to the statement made by counsel and assign it as error. It is an improper statement to make in this case.

The COURT. I will develop what the fact is; I will instruct the jury that they pay no attention to anything of that kind. I am bound to know the theory on which the question is asked, when it is objected to, especially. That is why I asked the reason.

Mr. WILSON. We insist on the error.

The COURT. You have your right to reserve your exception. I overrule your objection.

Which ruling defendant now assigns as
Error No. 1.

Mr. WILSON. We now move that the jury be discharged on the ground that improper

and foreign matter has come to the knowledge of the jury.

The COURT. The motion will be denied. I will instruct the jury to pay no attention to the remark of counsel, unless it should appear it is a pertinent fact.

Which ruling defendant now assigns as
Error No. 2.

Mr. CANNON. Q. Have you any connection, either as a stockholder, or otherwise, with any indemnity company such as I have described?

Mr. WILSON. We insist upon our objection.

The COURT. I overrule the objection.

Mr. WILSON. I will take an exception.

The COURT. They have a right to inquire into facts of that kind. It might affect a juror's fairness, and it might turn out that some of them were stockholders in some such company.

Mr. WILSON. The Supreme Court of this State has decided otherwise.

The COURT. The objection is overruled.

Which ruling defendant now assigns as
Error No. 3."

(Record, pp. 56-58).

Reduced to a simple proposition, the objection is that Mr. Cannon stated, in the presence of the jury that heard and determined this case, that the defendant was indemnified by insurance and that the insurance company was defending the case through its own counsel. These facts could not have been proved by him in the course of the trial, and it was misconduct for him to inform the jury of them. The Court, instead of then and there instructing the jury to disregard these matters, stated that it would develop the facts and

that it would instruct the jury to pay no attention to the same, unless they should appear as pertinent facts.

No evidence was introduced on the subject and it did not appear in the evidence or otherwise, except through the statements complained of, that the defendant is insured and that the insurance company is defending this case. The facts were not made to appear pertinent. Notwithstanding, the Court, overlooking its promise, wholly failed and neglected to instruct the jury relative to the matter. Defendant's counsel, of course, had a right to rely upon the promise of the Court in that particular, and the obvious misconduct of counsel, coupled with the neglect of the Court, prejudiced the defendant to the extent that its demands for a new trial must be granted.

It is reversible error for counsel to bring to the attention of the jury, at any time or in any manner, the fact that the defendant is insured as against the accident sued on, and in that connection, I beg to refer to the case of

Eckhart etc. Co. v. Schaeffer, 101 Ill. App. 500.

In that case, in the examination of the jury, one of the veniremen was asked if he was connected with the Fidelity and Casualty Company, and thereupon plaintiff's counsel said: "I may state, gentlemen, that the Fidelity and Casualty Company are defending this case." On the examination of another jurymen, a similar statement

was made by counsel for plaintiff, and then addressing counsel for defendant: "You are the attorney for the Fidelity and Casualty Company, are you not?" And, after objection: "I mean in this particular case he is the attorney for the Fidelity and Casualty Company." And again: "Mr. Dynes, isn't it a fact that the Fidelity and Casualty Company will pay any judgment rendered in this case?" And again: "Do you know Mr. Dynes here, who sits here, the attorney for the Fidelity and Casualty Company?" And again: "Now, this case is defended by the Fidelity and Casualty Company." And again: "Do you know their attorney here, Mr. Dynes or Mr. Williams?" The Court in its opinion, says:

"It sufficiently appears from the foregoing that the attorneys for the plaintiff (appellee here), not satisfied with asking jurors whether they knew any one connected with the Fidelity and Casualty Company, which question they had the right to ask, for the purpose of a peremptory challenge, and which was not objected to, proceeded further, and stated to the jurors that the Fidelity and Casualty Company was defending the case, and also stated that Mr. Dynes, who is appellant's attorney, was the attorney of the Fidelity and Casualty Company in this case in the trial court. And the court, by overruling the objections of appellant's attorneys to such statements, stamped the statement with the court's approval, so that they went to the jury with all the force and effect of evidence. Mr. Dynes was the attorney of record for appellant and the Fidelity and Casualty Company was not a party to the record. If it were a fact that the Fidelity

and Casualty Company was defending the suit, it would not be competent to prove that fact, for the plain reason that such proof would not tend, in any degree, to sustain the issues; it would be totally irrelevant. It is, therefore, plain that the attorneys, presumably learned in the law, could not have made the statements in question for any legitimate purpose, and while we will not say that they were made for an illegitimate purpose, and to prejudice the jury, we are of opinion that they were well calculated to have that effect."

And a judgment for the plaintiff was reversed.

The case of

Fuller v. Darragh, 101 Ill. App. 664,

is a similar case. Misconduct was charged against the plaintiff's counsel in telling the jury, at the time of their examination *voir dire*, that he understood that an insurance company was defending the case. And the Court in its opinion, says:

To the proper conduct of jury trials one thing is absolutely essential, viz., a recognition of the principle that at the bar of justice all men are equal.

"All causes are to be tried; all questions determined upon matters pertinent thereto, and not upon considerations which in the controversy ought not to be mentioned.

"If verdicts are to be rendered or judgments to be given for plaintiffs because they are popular, or their manner of living, business, lineage, association or benevolence commends them to the community, or against defendants for the reason that they hold opinions, advocate ideas or engage in enter-

prises distasteful to many, then is our whole system of jurisprudence a mockery and a delusion.

“None of the learned counsel for appellee will gravely contend that whether appellant had procured insurance against liability for accidents, or whether the suit under consideration was being defended by an insurance company or its attorney, could possibly throw any light upon the question of whether the injury to appellee had been occasioned by actionable negligence of appellant.

“Why, then, should the jury be told that the defense was made by a casualty insurance company? If this can be done, why may not a jury be told that the action is prosecuted by a corporation created to hunt up and prosecute accident cases, or by an attorney for a contingent fee; and that one-half of any verdict rendered for the plaintiff will go to such corporation or to his attorney?

“It is urged that this statement was made for the purpose of selecting a disinterested jury.

“Jurors may be asked if they know certain persons or have business or other relations with them, but under the guise of obtaining a fair jury, information calculated to prejudice jurors against either party cannot be given, and the trial court should not only prevent this, but if satisfied that despite its rulings jurors have thus been swerved in the considerations, should set aside verdicts so obtained.

“If a plaintiff, so unfortunate as to have had a father convicted of horse stealing and a mother of child stealing, comes into court asking that there be rendered to him what he believes to be his due, jurors cannot be

asked if they know his father, lately sentenced for larceny, or his mother, in the penitentiary for a most heinous offense.

“Counsel had no right to tell the jury that he understood that an insurance company was defending the case.”

The case of

Lipschutz v. Ross, 84 N. Y. Supp. 632,

is of the same character. It is said in the opinion in that case:

“The action was brought to recover damages for personal injuries alleged to have been sustained by the plaintiff by being struck by a vehicle and horse which were owned by defendant and driven by defendant’s employee. The cause came on for trial before one of the justices of the City Court. Twelve talesmen were called to act as jurors in the case, and, after taking their seats in the jury box, and while being examined by counsel for the plaintiff for the purpose of ascertaining whether or not they were acceptable, plaintiff’s counsel asked whether any of the jury were interested in the Travelers’ Insurance Company of Hartford, Conn. This was objected to, and the objection was overruled. One of the jurymen then stated that he, as an agent of that insurance company, had sold insurance policies. Thereupon, in the presence and hearing of the jurors statements were made by the court and counsel, and exceptions taken thereto as follows:

‘PLAINTIFF’S COUNSEL. I want to see whether any of the jury are connected with said insurance company. It now appears that one of the jurors is an agent of this very company, and I understand that this case is being defended by the Travelers’ Insurance Company.

‘DEFENDANT’S COUNSEL. I think the statement made by the counsel to the effect that he understands there is an insurance company interested in this case is prejudicial to the interests of the defendant in this action, and I ask that the case be withdrawn from this jury, and sent to another for trial.

‘The COURT. I will overrule your objection, and give you an exception.

‘(Exception taken by defendant’s counsel.)

‘The COURT. Assuming that an insurance company is interested in this case, I think the plaintiff has a right to find that out.

‘(Exception taken by defendant’s counsel. The jury was then accepted and sworn.)’

“We are of the opinion that the statements made by the plaintiff’s counsel and the court in the presence of the jurors impanelled to try the case were prejudicial to the defendant and constituted error, which requires a reversal of the judgment.”

In the case of

Manigold v. Black River Co., 80 N. Y. Supp.
862,

the Court said:

“The law is well settled that it is improper to show in an action of negligence that the defendant is insured against loss in case of a recovery against it on account of its negligence. This was expressly held in the case of *Wildrick v. Moore*, 66 Hun. 630 (22 N. Y. Supp. 1119). *It is not proper to inform the jury of such fact in any manner.* It is not material to any issue involved in the trial of the action, and certainly plaintiff’s counsel ought not to be permitted to do indirectly what he would not be permitted to do directly.”

The case of

Lone Star etc. Co. v. Voith (Tex.), 84 S. W.
1100,

was reversed because of the persistent efforts of plaintiff's counsel, from the beginning to the close of his argument, to get before the jury the fact that the defendant was insured by such insurance company against loss by reason of plaintiff's injuries.

A similar case is that of

Coe v. Van Why, 33 Colo. 315; 80 Pac. 894.

See also:

Casselmon v. Dunfee, 172 N. Y. 507;

Barrett v. Bonham Oil Co. (Tex.), 57 S. W.
602;

Iverson v. McDonnell, 36 Wash. 73; 78 Pac.
202;

Sawyer v. Arnold Shoe Co., 90 Me. 369; 38
Atl. 333;

Waldrick v. Moore, 22 N. Y. Supp. 1119;

Gass etc. Co. v. Robertson (Ind.), 100 N. E.
689;

Van Buren v. Mountain Copper Co., 123
Fed. 61;

Roche v. Llewellyn Iron Works, 140 Cal.
574.

The case at bar comes squarely within these authorities. Mr. Cannon, most learned in the law, and, particularly, in the law of negligence cases, must have known that no evidence could be intro-

duced on the trial for the purpose of showing that the defendant is indemnified against any judgment that plaintiff may obtain in this case, yet, he forced the way to make a statement to that effect before the jury. Such information, so conveyed to the jury, could have had but one purpose,—the sinister purpose of prejudicing the jury against the defendant. The trial Judge, instead of promptly instructing the jury to disregard all the facts so stated by Mr. Cannon, declared that he would instruct “the jury to pay no attention to the remark of counsel, *unless it should appear to be a pertinent fact.*” This did not appear. The Judge did not “instruct the jury to pay no attention to the remark of counsel.” The jury were left to conclude that the insurance was a fact and that that fact was pertinent to the case. The matter went to the jury with all the force and effect of evidence, emphasized by the objection and discussion, and stamped with the approval of the Court. The error is more glaring and prejudicial than those complained of in the cases above cited.

II.

THE FOURTEENTH ASSIGNMENT OF ERROR.

On the examination of the witness, Lawrence Whitsett, he was asked by plaintiff’s counsel:

“Q. What was the condition of your father and mother with reference to their financial condition and their health and ability to earn money generally?”

This question was objected to on the ground that it was irrelevant, incompetent and immaterial and not the proper proof of damages in the case, and calling for the conclusion of the witness. Mr. Cannon then stated:

“I will modify the question. What was the financial condition of your parents at the time of the death of one brother and the injury to the other?”

To which the same objection was interposed. The objection being overruled, the witness answered:

“They were very poor. My brother Frank had contributed to their support since he was big enough to work for wages” (Record, pp. 67 and 68).

The financial situation and standing of the parties to a suit are wholly irrelevant. The amount of damages depends upon circumstances wholly independent of the wealth or poverty of the parties. The learned Judge of the District Court, while an Associate Justice of the Supreme Court of the State of California, decided the case of

Green v. Southern Pac. Co., 122 Cal. 564, where he said:

“The trial court very clearly committed prejudicial error in admitting before the jury, over defendant’s objection, the testimony of the witness Hayes, to the effect that the plaintiff Salona Green, one of the daughters of deceased, who was living with him at his death, had no property of her own upon which to maintain herself. This evidence had no pertinent or competent bearing upon the extent

of injury suffered by plaintiffs, for which defendant could be held responsible, and its only effect and inevitable tendency was undoubtedly to excite the sympathies of the jury and improperly influence their finding upon the question of damages. Such evidence is never admissible in a case of this character, for the very simple reason that the extent of a defendant's responsibility for the results of his negligence is not to be measured by the condition as to affluence or poverty of the injured party at the time of suffering the injury, since that is a condition for which the defendant is in no way responsible; and as suggested by this court in *Mahony v. San Francisco etc. Ry. Co.*, 110 Cal. 471, 476, in discussing the same question: 'Such testimony could have been offered for no other purpose than to create prejudice, and should have been excluded.' (See, also, *Malone v. Hawley*, 46 Cal. 409; *Chicago etc. R. R. Co. v. Johnson*, 103 Ill. 512; *Pennsylvania Ry. Co. v. Roy*, 102 U. S. 451; *Central R. R. Co. v. Moore*, 61 Ga. 151.)"

In addition to the cases cited by the learned Judge in the above quotation, see:

Johnston v. Beadle, 6 Cal. App. 253;

Shea v. Railway, 44 Cal. 414-429;

National Biscuit Co. v. Noland, 138 Fed. 6-9.

On the motion for new trial it was argued that the evidence in question was admissible under the provisions of Section 1970 of the Civil Code. That section provides that when death results from an injury to an employee, received in the manner specified in said section, the personal representative shall have a right of action and may recover

damages "for the benefit of the widow, children, dependent parents and dependent brothers and sisters in the order of precedence as herein stated." Counsel then contended that this action being brought under that section, the word "dependent" as there used, means something more than those who prior to the death received pecuniary assistance from the deceased. In other words, that it means a state of dependence upon the public or any individual or individuals. Such cannot be the meaning of the word as here used, because the purpose of the provision of Section 1970, under consideration, is to provide for a recovery of damages in case of the accidental death of an employee, and in the assessment of damages in all such cases the financial state of the parents is wholly immaterial. It is the law, and the jury were instructed in this case to restrict their damages to the actual pecuniary loss suffered by the father and mother from the death of their son, Frank; that is, the jury were told that "Your verdict should be limited to that amount which the evidence shows that the deceased would have probably earned, and, after paying his own expenses for his food, lodging, clothing and the necessary and ordinary expenses and costs of living, would have given or turned over to his father and mother for their own use" (Record, p. 141). In this connection, therefore, the word "dependent" means "one who relies for support on another in some way", one who has the right to, and who

does look to—depend—upon another for monetary assistance or support.

13 Cyc., 788;

Nye v. Grand Lodge, 9 Ind. App. 131; 36 N. E. 429, 436;

Supreme Council v. Perry, 140 Mass. 580-590;

Ballou v. Gile, 50 Wis. 614-619; 7 N. W. 561-563.

In the case of

Martin v. Modern Woodmen, 111 Ill. App. 99, the Court, in defining the word “dependent”, said:

“It means dependence for support and maintenance; yet the dependence for support meant by the statute and the by-law need not be complete dependence upon the member for support, but a regular and partial dependence is sufficient to entitle the party to the benefit of the certificate.”

So, again, in the case of

Alexander v. Parker, 144 Ill. 355; 33 N. E. 183,

the Court defines “dependence” as:

“One who is sustained by another, or relies for support upon the aid of another.”

This case was affirmed in

Royal League v. Shields, 251 Ill. 250; 96 N. E. 45.

In the case of

Caldwell v. Grand Lodge, 148 Cal. 197,

the Supreme Court of California quoted from the case of

McCarthy v. New England Order, etc., 153
Mass. 314,

as follows:

“Trivial, casual or perhaps wholly charitable assistance would not create the relationship of dependency within the meaning of the by-laws. Something more is undoubtedly required. The beneficiary must be dependent upon the member in a material degree for support or maintenance or assistance, and the obligation on the part of the member to furnish it must, it would seem, rest upon some moral or legal or equitable ground, and not upon the purely voluntary or charitable impulse or disposition of the member.”

While these cases relate to benefit insurance societies and their certificates of membership, the definitions given are applicable to the construction of the statute under consideration. The certificates and statutes relate to money to be acquired by a beneficiary on the death of some person upon whom he is dependent.

Obviously, a party charged with wrongfully committing a personal injury which produces the death of another, cannot be held responsible for the physical or financial handicaps of the parents of the latter which existed before or at the time of the injury and death. Such never has been the rule, and, under the statutes in the different states which sought to remedy the defect of the common law that allowed no right of action to recover

damages for such death, and which are all more or less modeled after Lord Campbell's Act, it has always been held, following the rule laid down by the English Courts, that the damages must be restricted to pecuniary loss, except in those few cases where exemplary damages may be given.

Green v. Southern Pacific Co., 122 Cal. 567;

Burke v. Arcata etc. Ry., 125 Cal. 366.

As we have seen, the witness, Lawrence Whitsett, stated that: "My brother Frank had contributed to their" (meaning his father and mother) "support since he was big enough to work for wages." And the trial Judge instructed the jury that in the estimation of damages, they were to determine the amount of that contribution in the determination of the pecuniary loss sustained by the plaintiffs. This brings the case with Section 1970. "Dependence" is shown. The purpose of the act is accomplished. Why, then, say that the parents are very poor? As said in

Mahony v. San Francisco Etc. Ry. Co., 110 Cal. 476:

"Such testimony could have been offered for no other purpose than to create prejudice, and should have been excluded."

III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

Here in consideration is given to the twenty-seventh assignment of error, which is the order

of the Court denying defendant's motion for a nonsuit (Record, p. 87), the fortieth assignment of error, which is the refusal of the trial Court to instruct the jury to return a verdict for the defendant (Record, p. 185), and the fifty-seventh assignment of error, which is the ruling of the Court denying defendant's petition for a new trial (Record, pp. 200 and 201).

The second amended complaint, upon which plaintiff went to trial, charges in paragraph six that the defendant

“failed and neglected to exercise ordinary care in providing and maintaining a safe, suitable and proper place for the said Frank Whitsett to perform his said labor, as aforesaid, and particularly, in this, that on the 9th day of March, 1909, while the said Frank Whitsett was working as a miner, driller and laborer for the said defendant, Balaklala Consolidated Copper Company, in operating a drill at the face of the tunnel in pursuance of said employment and at a place where he was required and directed by said defendant to work, the drill, so operated by him, ran into and exploded a charge of powder, which had been negligently left in said position by said defendant, Balaklala Consolidated Copper Company, and the presence of which was then and at all times theretofore unknown to the said Frank Whitsett. That the said Frank Whitsett was killed by and as a result of said explosion.”

The seventh paragraph is as follows:

“That the unsafeness of the place where the said Frank Whitsett was killed could have been by said defendant, Balaklala Consolidated

Copper Company, discovered and known by the use and exercise by it of ordinary care and diligence" (Record, p. 29).

These allegations are denied in the answer (Record, pp. 35 and 36).

Under these pleadings the burden of proving the alleged negligence is on the plaintiff, and there is no presumption of negligence arising from the mere fact of the accident or death.

Sappenfield v. Railway, 91 Cal. 56;

Puckhaber v. Railway, 132 Cal. 364;

Patterson v. Railway, 147 Cal. 183;

Thompson v. Cal. Construction Co., 148 Cal. 40.

The defendant was not an insurer of Frank Whitsett against accidental injury. Its obligation was to use ordinary care, and ordinary care in this connection means such care as prudent employers in the same line of business ordinarily use under the same circumstances.

Sappenfield v. Railway, 91 Cal. 56;

Brymer v. Southern Pacific Co., 90 Cal. 498;

Brett v. Frank & Co., 153 Cal. 272.

And, as indicated in the second amended complaint, the defendant's negligence is to be measured by its knowledge or means of knowledge of the defect complained of.

Sappenfield v. Railway, 91 Cal. 57;

Brymer v. Southern Pacific Co., 90 Cal. 498.

If the defect was such as to deceive human judgment, in other words, if, by the exercise of the ordinary care above mentioned, the defendant did not, or could not, have discovered the defect complained of, then it is not liable.

Thompson v. Cal. Construction Co., 148 Cal. 39;

Malone v. Hawley, 46 Cal. 414.

The jury are not permitted to guess that defendant was negligent or that it could—through any of its officers—have seen an unexploded blast that the workmen themselves were unable to discover.

Puckhaber v. So. Pacific Co., 132 Cal. 366.

The evidence shows that after a blast, a man by the name of Yokum was employed in the shift in which the Whitsett brothers worked; his duties were to use an iron bar for the purpose of prying down,—“barring down”,—the loose pieces of rock that had not been broken entirely free by the blast, and also to look for “missed-shots” or “missed-holes”, that is to say, those holes that had been loaded with dynamite, and which, for some reason, had failed to explode (Record, pp. 90 and 91). Yokum was employed by the defendant as an extra precaution. Such a man is not ordinarily employed by mining companies under similar circumstances (Record, pp. 118, 119, 121, 125).

If missed-shots were found, they were blasted before further drilling took place. The loose rock,

which resulted from the blast, was cleared away by the "muckers". It sometimes required the work of more than one shift of muckers to clear away the loose rock or muck.

As is obvious, the best time to examine the face of the drift or cross-cut, for the purpose of discovering missed-shots, was after the muck had been removed, but the exigencies of mining sometimes required Yokum, the missed-shot man, to examine the face before the muck had been cleared away (Record, pp. 91 and 115). In such case he would examine as far down as possible, that is to say, as far down as the muck, but it was not his duty to clear away the muck and examine beneath it (Record, p. 92), it being clear from the evidence that it would be a physical impossibility for him to remove the muck in addition to his other duties (Record, p. 91).

In view of the incomplete examination that the missed-shot man was ordinarily enabled to make, it was the duty of the machine men to examine the face of the drift or cross-cut for missed-shots before setting up their machine and beginning drilling operations (Record, pp. 88, 92, 109, 117). There is some conflict in the testimony as to the duty of the machine men in this particular (Record, pp. 125, 126). That the questions of fact arising from this state of the evidence were not properly submitted to the jury is one of the contentions of the defendant, which will receive attention later.

A missed-shot is ordinarily plain to be seen and can be detected without any trouble (Record, p. 92), but it is possible for the rock to so break that it would conceal a missed-shot "and that is why they come at times to miss discovering them, because they are concealed" (Record, p. 108).

Bearing in mind that missed-shots are ordinarily easy of detection, but that sometimes they are so concealed that they cannot be discovered, and bearing in mind the legal principle that it is the duty of every workman to exercise his faculties for self-protection,

Hightower v. Gray (Tex.), 83 S. W. 254-256;

Olson v. McMullen, 34 Minn. 94; 24 N. W. 318;

Crown v. Orr, 140 N. Y. 450; 35 N. E. 648;

Kenna v. Central Pacific, 101 Cal. 29;

Towne v. United Electric Co., 146 Cal. 770;

Russell Creek Coal Co. v. Wells, 96 Va. 416;

31 S. E. 614,

I shall now proceed to show that there is no proof in this case of the allegations contained in the second amended complaint that the missed-shot causing the accident complained of could or should have been discovered and known by the defendant by the use of ordinary care and diligence.

The witness Yokum testified that he examined the face of the cross-cut where the accident occurred after the first blast. His examination was from the top of the cross-cut down to the pile of muck,

but he discovered no missed-shot. He did not know when the muck was removed and did not go back after its removal for the purpose of making further examination, because, he says, that was not his business, but the duty of the machine men (Record, pp. 111, 112, 115, 116, 117). The witness further says that he was at that place about half an hour before the accident. That Frank Whitsett was there alone, starting a hole, or lifter. The hole was in 5 or 6 inches, perhaps, and he seemed to be having trouble with it. The witness helped him line up the machine. The witness did not look for missed-shots at that time, but he did not see any in the neighborhood of the place where the drill entered the face of the cross-cut. While there was muck there, it had been cleaned away "the best they could before they set up." He says: "I did not see any indication of a missed-hole in that vicinity" (Record, p. 116). He further states that it was more or less the duty of everyone in the mine to look for missed-shots; and

"Q. I will ask you this—Did or did not every miner employed on those premises have to look out for missed-holes?

A. Why, certainly" (Record, p. 117).

The witness Meyers, who was one of the two shift bosses in charge of the shift in which the Whitsett brothers worked, testified that he was acquainted with the place where the accident happened, and that he directed the drilling machine

to be set up there; that at that time the muck was pretty well cleaned up; that he could see the face tolerably well. That while he did not examine it carefully, he walked up and looked it over and could see no reason why they should not set up there. "I did not discover a missed-shot," he says (Record, p. 107). Again, he testifies: "When I told the Whitsett boys to set up their machine at this place, I did not see a missed-hole in this face, nothing to make me suspicious of anything like that * * * I looked at the face when I set these men up there, and saw nothing" (Record, p. 109). On the night of the accident this witness again visited the place where the Whitsett brothers were working shortly after the shift started (Record, p. 110), and while he does not say that he did not at that time discover a missed-shot, it is only logical to conclude from his testimony that, had he discovered one, he would have stopped the work. He further testified that it is a custom in mining for machine men to look for missed-holes and that they did in this mine. And he says: "That is a thing that is so thoroughly understood among miners, that there is no such thing as duty attached to it and no such thing as instructing them concerning it" (Record, p. 109).

The witness Hall, who was the other shift boss, testified that he saw the place where the accident happened, probably an hour before its occurrence, but that he did not at that time see a missed-shot in the face of the cross-cut (Record, p. 104).

The witness, Lawrence Whitsett, was at the place of the accident for five minutes after his two brothers had begun work there, but he saw no missed-shot (Record, pp. 69 and 92.) He knew the appearance of missed-shots, and he had previously discovered a number in this mine (Record, p. 65).

And the witness Wall testified to substantially the same facts. His work was within thirty feet of the place of the accident. He says he went to get a drink and coming back stopped to talk with the Whitsett boys and remained there probably five minutes. He noticed that the day shift had drilled about five holes, but he does not say that he saw a missed-shot (Record, pp. 72, 75).

Fred Whitsett, the surviving brother, testified that he and his brother reached the place of the accident when they went on shift, probably ten minutes after eight, but that they were obliged to wait for steel drills, and it was ten o'clock before they got the drill working. That when he first went to the place of the accident on that evening he remained probably five minutes, during which time he looked at the holes that had been drilled by the day shift, and saw those that had been previously drilled by his brother and himself. He then went for the drills, returning about ten o'clock, when he took out the old drill and put a new one in the machine. In order to do this, he was obliged to stoop over and his face came within a foot of the face of the cross-cut and about eighteen

inches from the ground, and he could see the face of the wall perfectly (Record, p. 84). He was in close proximity to the unexploded blast but did not see it.

While he states in one part of his testimony, that he did not know the appearance of a missed-shot, his entire evidence does not sustain this denial, as he says that he had assisted in loading dynamite into the holes at various times, and that on top of the dynamite they sometimes placed a little mud; that there was a cap and fuse, the latter sticking out of the hole. He, therefore, knew the appearance of a hole loaded and ready to blast, and he states that a missed-hole is a loaded hole that has not gone off; consequently, he must have known what a missed-shot looked like. Further he says that he knew that missed-shots sometimes occurred, and, finally, on cross-examination, he was asked:

“Q. You have seen a missed-hole, of course?

A. I don't remember whether I did or not.

Q. You don't know whether you ever did or not?

A. No, sir” (Record, pp. 82-85).

While there is a conflict in the testimony as to whether or not it was the duty of Fred Whitsett, a chuck tender, to look for missed-shots, it is certain from his testimony that he did not discover a missed-shot, or anything to excite his suspicions, at the place of the accident, and it is equally cer-

tain that he had a very good opportunity of discovering anything unusual or suspicious about his place of work.

Frank Whitsett remained at the place of the accident from ten minutes past eight until ten o'clock. We do not know how he occupied his time, except that the witness Yokum says that he was at the place about half an hour before the accident; that Frank Whitsett was there alone, starting a hole or lifter. Yokum helped him line up the machine. At that time the muck had been cleaned out (Record, p. 116). Frank was an experienced miner and is presumed to have known about missed-shots and their appearance. If there had been a missed-shot observable, it is certain that Frank would have seen it.

From all the testimony quoted, it is apparent that missed-shots are of two classes: First, those that are readily seen as soon as the muck is cleared away; and, second, those that are so hidden that they cannot be discovered by the exercise of any reasonable degree of care. It is further obvious that the missed-shot in this particular case belonged to the latter class, and that none of these witnesses were able to discover it. It does not appear from the evidence that any precaution, usually taken by miners in such cases, was omitted.

How, then, could the defendant, who must act through its employees, in the exercise of ordinary care, have discovered a missed-shot that deceived so many?

If it was so hidden as to be undiscoverable by the exercise of ordinary care by those whose duty it was to discover the same, there can be no recovery, because the case is lacking in an essential element. It is, as we have seen, necessary for plaintiff to plead and prove that the defendant knew, or by the exercise of ordinary care could have known, of the unexploded blast causing the accident. This he did plead (Record, p. 29), but this he did not prove.

In the case of

Malone v. Hawley, 46 Cal. 414,

the Supreme Court said:

“The liability of the defendants depended upon three facts: First, that the method of attaching the hoisting rope to the cage was defective and unsafe, and the injury was caused to the plaintiff by the defect; second, *that the defendants knew, or ought to have known, of the defect*; and third, that the plaintiff did not know of it, and had not equal means of knowledge.”

And so in the case of

Sterne v. Mariposa etc. Co., 153 Cal. 522,

the Supreme Court, in affirming the case of *Malone v. Hawley*, said:

“It was essential to the existence of negligence on the part of the defendant in the matter, not only that the appliance was in fact not a safe appliance for the work, but *also that the defendant, or its representative Maguire, knew, or ought in the exercise of reasonable care for the safety of its employes to have known, that the wrenches furnished were not safe and sufficient.*”

See also

Wright v. Pacific Coast Oil Co., 6 Cal. Unrep. 93;

Pacific Co. v. Johnson, 64 Fed. Rep. 958;

Bone v. Ophir etc. Co. (Cal. 1906), 86 Pac. 685;

Brunell v. Southern Pacific, 34 Ore. 256; 56 Pac. 129.

There is another reason why plaintiff cannot recover in this action, which is this, that the negligence relied on for a recovery, as we have seen, is that defendant failed to provide a reasonably safe place in which deceased was to do his work. The duty that rested upon the defendant in this particular has well defined limitations, and the law relative to that subject, as applicable to the unquestioned facts in the case at bar, is settled by an almost unbroken current of authority. The master's duty to maintain a reasonably safe place of work is applied only where the place is permanent or *quasi* permanent, and it does not apply to such places as are constantly shifting or being transformed as a direct result of the employee's labor and where the work in its progress necessarily changes the character of the place for safety from moment to moment.

The case of

Consolidated Coal & Mining Co. v. Floyd, 51 Oh. St. 542; 25 L. R. A. 854,

is quite similar to that at bar. It was an action to recover damages for death. Clay, the deceased, was employed in mining coal and was killed by the falling upon him of a portion of the roof of the compartment in which he was at work. In the progress of the work it was the duty of a man, Dalton, to post and prop the roof of the mine. The Court says in its opinion

“It is insisted by the defendant in error that the duty of the defendant company in respect to furnishing a safe working place, was such that it was liable for the negligence of Dalton, irrespective of the question of his incompetency, and of the company’s knowledge thereof, and the case was given to the jury by the learned judge of the common pleas upon this theory. Necessarily this view of the law proceeds upon the assumption that Clay and Dalton were not fellow servants, but that, as respects the posting and propping, Dalton was the *alter ego*, of the company, and hence the superior of Clay. The claim is sought to be sustained by a class of cases which hold that the duty of the master to provide a safe working place and machinery for his employes cannot be delegated so as to absolve the master from liability in case of failure of the vice-principal to perform that duty. It does not seem necessary to review these cases. They are, as a rule, based upon the proposition that where the appliance, or place, is one which has been furnished for the work in which the servants are to be engaged, there the duty above stated attaches to the master. We need not discuss this proposition for we have not that case. Here the place was not furnished as in any sense a permanent place of work but was a place in which surrounding conditions were constantly changing, and in-

stead of being a place furnished by the master for the employes within the spirit of the decisions referred to, was a place the furnishing and preparation of which was in itself part of the work which they were employed to perform.”

(A number of cases being cited.)

In the case of

American Bridge Co. v. Seeds, 144 Fed. 605;
11 L. R. A. (N. S.) 1042,

plaintiff was employed in the work of removing an old railroad bridge and in constructing a new one across the Missouri River. In the course of his work he was struck by a piece of iron being hoisted with a fall and tackle, and knocked off the staging erected at the side of the bridge. In reversing a judgment in favor of the plaintiff, the Court, by Judge Sanborn, says:

“And, finally, the positive duty of the master does not extend to making or keeping a place reasonably safe, where the work is to make a reasonably safe place dangerous or an obviously dangerous place safe, as in blasting rock, tearing down structures, and removing superincumbent masses.”

In the case of

Anderson v. Daly Mining Co., 16 Utah 28;
50 Pac. 819,

in which the plaintiff was injured by the explosion of a missed-shot, we find it stated that:

“While the employer is bound to furnish a safe place for the servant to work in, he is not bound to make it an absolutely safe place; but

in a place where the nature of the business is such that the conditions are continually changing by reason of the putting in and setting off of blasts, and of continuing excavations in a shaft, and thereby temporarily dangerous conditions arise, the employer cannot be held responsible therefor. * * * The employer was bound to furnish a reasonably safe place and appliances with which to do the work. But where the nature of the business is extremely dangerous, and conditions are necessarily continually changing by reason of placing and setting off blasts, whereby dangerous conditions arise continually through the acts of the servant, without the knowledge of the master, the employer cannot be held responsible therefor without his fault."

The foregoing was quoted with approval in

Shaw v. New Year etc. Co., 31 Mont. 138; 77
Pac. 517,

in which case plaintiff was also injured by the explosion of a missed-shot.

See also

City of Minneapolis v. Lundin, 58 Fed. 529;
Finlayson v. Utica etc. Co., 67 Fed. 510;
Gulf etc. Co. v. Jackson, 65 Fed. 50;
Florence etc. Co. v. Whipps, 138 Fed. 13;
Moon Anchor etc. Mines v. Hopkins, 111 Fed.
303;
Fournier v. Pike, 128 Fed. 993;
Kreigh v. Westinghouse etc. Co., 152 Fed.
120;

Armour v. Hahn, 111 U. S. 313; 28 L. ed. 440;
Poorman etc. Co. v. Devling, 34 Colo. 37; 81
 Pac. 252;
Heald v. Wallace, 109 Tenn. 346; 71 S. W. 84;
Holland v. Durham Coal Co., 131 Ga. 715;
 63 S. E. 292;
Rolla v. McAlester Coal Co., 6 Ind. Ter. 410;
 98 S. W. 141;
Thompson v. California Construction Co., 148
 Cal. 39.

It follows, therefore, that under the facts shown by the evidence in this case, there was no duty on the part of the defendant to furnish the deceased with a reasonably safe place in which to do his work. There being no duty, there could be no breach thereof, and plaintiff has no cause of action upon which to base a judgment.

IV.

AS TO ERRORS NOS. 44 AND 45.

The trial Court was requested to charge the jury relative to the law last considered in the preceding point, but refused to do so, the requested charges being as follows:

“I charge you that the doctrine of law requiring an employer to furnish a safe place in which his employee may perform his work has no application where the place of work is not permanent or has not previously been prepared by the master as a place for doing the work, or

in those cases where the employee is employed to make his own place to work in, or where the place is the result of the very work for which the servant is employed, or where the place is inherently dangerous and necessarily changes from time to time as the work progresses" (Record, p. 188).

And again in a modified form:

"It is a rule applicable to cases of this character that the employer is not liable for dangers existing in the place where the employee is assigned to work, unless the employee knows of the dangers or defects or might have known thereof, if he had used ordinary care or skill to ascertain them, and I charge you that this rule applies with greater force in cases where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and in such cases the employee himself in the progress of the work is under as great an obligation as is the employer to be on the lookout for such dangers" (Record, p. 189).

The refusal of the Court to charge the jury in accordance therewith, being assigned as Errors Nos. 44 and 45, respectively.

The argument made and cases cited in the last preceding point fully establish the correctness of the law as set forth in these requests and that the law is applicable to the facts shown by the evidence. The refusal to give the same, therefore, was palpable error.

V.

ERRORS 49 AND 53.

The Court charged the jury in this cause as follows:

“In this connection, however, you will bear in mind that if you find that the defendant, in operating the mine in question, provided an inspector called a ‘missed-hole man’, and that it was the duty of such employee to search for and discover missed holes or unexploded blasts, and to explode such blasts, or to report the existence thereof to his superior before the succeeding shift should go to work at any place where a round of blasts had been exploded, then any driller or chuck tender regularly set at work by his superior at any place where it was the duty of such inspector to make such search and discover such unexploded blast, was entitled to assume that such inspector had done his duty in that regard, and to act upon that assumption, and would not be guilty of negligence for failing to make such inspection himself” (Record, pp. 197, 198).

The defendant on its part had requested, but the Court refused, to charge the jury as follows:

“If you find in this case that it was the duty of Frank Whitsett to look for and discover, if possible, missed shots in those places in the defendant’s mine where he was engaged to labor, and if you further find that the accident complained of was caused by an unexploded blast that could have been discovered by said Frank Whitsett, in the exercise of ordinary care, or if you find that said unexploded blast was so concealed that it could not have been discovered by said Frank Whitsett, by the exer-

cise of ordinary care, then and in that event, I charge you that neither plaintiff can recover in these actions, and that your verdicts must be in favor of the defendant'' (Record, pp. 193, 194).

Exception was taken to the giving of the one charge and refusal to give the other.

Aside from defendant's contention that no duty rested upon it to furnish deceased with a reasonably safe place in which to do his work, it was further insisted that the employment of Yokum, the missed-shot man, was an extra precaution, and that such employment did not relieve the miners from their duty of looking for missed-holes, because the examination made by Yokum was frequently incomplete, for the reason that he could not look beneath the muck which he could not remove. This position of defendant was amply supported by evidence. Plaintiff on his part, however, contended otherwise, and there is some evidence in support of his theory. Under these circumstances, it was for the jury to determine, under proper instructions from the Court, what were the true facts, and whether or not, in view of the employment of Yokum, there still remained any duty on the part of Frank Whitsett to look for and discover, if possible, missed-shots while he was employed in the defendant's mine.

The testimony relating to the subject is as follows: The witness Yokum stated that he was hired to bar down, and a day or two later the shift boss gave him orders to look out for missed-holes and shoot them

when he could, otherwise, to have the machine men shoot them; that he had nothing to do with the muck that accumulated on the floor of the drift or cross-cut after a blast. It was his duty, he stated, to examine as far down as he could, which would be down to the muck; that it was not his duty to remove the muck (Record, pp. 111 and 112, 115); that after the muck was cleared away it was the business of the machine men to examine for missed-holes (Record, pp. 116 and 117); that every miner employed by the defendant had to look out for missed-holes (Record, p. 117).

The witness Meyers testified that in every place where he had worked it was the custom for machine men to look out for missed-holes, and that they did so in defendant's mine. He says:

“That is a thing that is so thoroughly understood among miners that there is no such thing as duty attached to it and no such thing as instructing them concerning it” (Record, p. 109).

Greninger, the foreman, says:

“It was the duty of all machine men to look for missed-holes, in order to protect themselves in cases where the missed-hole man was not, for any reason, able to find them, either being limited in time or from being covered with muck” (Record, p. 88).

The witness further testified:

“Q. Then, what was the object of having a missed-hole man?

A. It was this: We had in this mine many men employed as muckers, not acquainted with powder and would not know it if they saw it. These bar men and missed-hole men were employed by me for the purpose of protecting those men and also leaving the upper part of the face clean, so that a machine could be set up when a machine had finished somewhere else.

My idea in employing the missed-hole men was to protect the inexperienced men."

The witness Thomas testified that he never heard of the employment of a missed-hole man, except upon this occasion; that there is a custom among miners—machine men—to examine for missed-holes (Record, p. 118). Pritchard testified to the same facts, and added that:

"The business of examining for missed-holes devolves on both the machine man and chuck tender" (Record, p. 119).

And so the witness Davis testified that it is the custom for the miners to look for unexploded blasts or missed-shots, and that it is not customary to place that duty upon a missed-shot man (Record, p. 121). And further, that if there is a missed-hole man employed in a mine, the duty would devolve on both him and the miners to look for missed-holes (Record, p. 123). So the witness Gowing says that it is the custom for the drill operator to investigate or look for missed-shots (Record, p. 124).

On the contrary, Lawrence Whitsett testifies that in big mines he had never heard that it was the

custom for the miner and chuck tender to look out for and discover missed-holes (Record, p. 125). Yet, he says that at different times he discovered and reported missed-shots (Record, p. 65). And Enos Wall testifies in a similar strain (Record, p. 126).

With this conflict in the testimony, it was for the jury to determine the facts as to whether or not the employment of a missed-shot man entirely relieved the miners from their duty to look out for and discover missed-shots, and it was, consequently, error for the trial Judge to charge the jury, as matter of law, that in the event that the defendant provided an inspector, called a missed-hole man, then any driller or chuck tender, regularly set at work at places inspected by such missed-hole man,

“was entitled to assume that such inspector had done his duty in that regard and to act upon that assumption, and would not be guilty of negligence in failing to make such inspection himself.”

Under the charge as given, the jury were left uninformed as to the law to be applied in the event that they found that the employment of Yokum did not relieve Frank Whitsett from his duty to make an inspection for missed-shots. That the jury could very well have found such to be the facts, is evident from the volume of testimony introduced by the defendant in this connection. Proper instructions of the Court in a case of this character must embrace the subject from every angle. The jury should have been told that the defendant could lawfully

place the duty of inspection on the shoulders of both Yokum and Frank Whitsett. This was the theory of the defendant, and, there being evidence to support it, defendant was entitled to have the same submitted to the jury under proper instructions.

People v. Taylor, 36 Cal. 265;

Davis v. Russell, 52 Cal. 615;

Buckley v. Silverberg, 113 Cal. 682;

Walsh et al. v. Tait, 142 Mich. 127; 105 N. W. 544;

Colgrove v. Pickett, 75 Neb. 440; 106 N. W. 453;

Hauber v. Leibold, 76 Neb. 706; 107 N. W. 1044.

If this is a proper subject for instructions under the evidence in the case at bar, the trial Judge could properly have told the jury in effect that if they found from the evidence that the employment of Yokum wholly relieved Frank Whitsett from the duty of looking for missed-shots, then and in that event, said Frank Whitsett was entitled to assume that such inspector had done his duty in that regard and to act upon the assumption, and would not be guilty of negligence in failing to make such inspection himself, whereas, if, on the other hand, they found that the employment of Yokum did not relieve Frank Whitsett from such duty of inspection, then any failure or neglect of said Whitsett to make such an inspection on his own behalf would amount to such contributory negligence as would defeat plaintiff's action.

The error is apparent from another view point. The instruction given was based upon the theory that it was the absolute duty of the defendant to furnish Frank Whitsett with a reasonably safe place in which to do his work. We have seen, however, in the preceding points that this duty of the employer does not apply where the place of work is not permanent or, what may be termed, *quasi* permanent. Where the conditions surrounding the place of work are constantly changing owing to the progress of the work, and where the employee has facilities equal to those of the employer for ascertaining the dangers in the place of work, the employee is under as much obligation as is his employer to be on the lookout for defects or dangers. Consequently, the rule requiring the employer to furnish a reasonably safe place of work is inapplicable. The facts of the case at bar bring it within the exception to the rule. See authorities cited in point III.

From the foregoing, we cannot escape the conclusion that it was error to give the charge complained of and error to refuse the charge requested.

VI.

AS TO ERROR NO. 48.

The trial Court refused to instruct the jury at the request of the defendant as follows, to wit:

“In the case brought by Reardon, for the death of Frank Whitsett, there is no charge in

the complaint that the accident was proximately caused by the incompetence of Yokum, or of a missed-shot detective, and I charge you that no recovery can be had in that case on that ground, or, if you should find that the accident was proximately caused by the negligence of Yokum or of some other missed-shot detective, or of the deceased in that case, then your verdict must be for the defendant" (Record, p. 155).

This is a correct statement of the condition of the pleadings and of the law, and it was error for the Court to refuse to so charge the jury.

This case, together with that of Fred Whitsett against the same defendant, was consolidated for the purposes of trial, and, while the two cases arose out of the same accident, the pleadings were different in this respect: In the Reardon case the negligence charged is the failure of the defendant to provide Frank Whitsett with a safe place in which to work (Record, p. 29); in the Fred Whitsett case the defendant was charged with negligence in not providing a safe place in which the plaintiff was to perform his work and also in having in its employ an incompetent inspector or missed-hole man (Record, Fred Whitsett case, No. 2419, pp. 24-25).

Under these pleadings a recovery might be had in one case and none in the other. Yet, the distinction is nowhere pointed out by the trial Judge. He says in his charge:

"In the case in which Fred Whitsett is plaintiff, the action is prosecuted by that plaintiff, in his own right, to recover for his own benefit compensation for the loss and damage alleged

to have resulted to him through the defendant's negligence in causing the accident counted upon, and the resultant wounds and injuries to his person as set forth in the complaint in that action.

"In the other action in which J. E. Reardon, as administrator of the estate of Frank Whitsett, deceased, is plaintiff, the action is prosecuted by the plaintiff to recover for the benefit of James Whitsett, the father and next of kin of the decedent, damages alleged to have been suffered by the father and mother through the death of the son, resulting, as is alleged, from defendant's negligence in causing the accident in which Frank Whitsett was killed. Such a right of action the law gives under circumstances such as those here alleged.

"As the evidence discloses, and about which there is no dispute, the cause of the injury in both cases, as above indicated, was the same, that is, an accidental explosion in the defendant's mine. That accident is in both instances alleged to have occurred through the defendant's negligence, and therefore the essential element of the cause of action in each case is the negligence of the defendant" * * * (Record, pp. 128, 129).

"This employment gave rise to the relationship known in the law as that of master and servant as then existing between the Whitsetts and the defendant. This fact, and the fact that the injuries sued for in both actions arose out of the same accident or occurrence, renders the principles governing the relations of master and servant, which I am about to state to you, applicable to the rights of the parties to both of the actions involved, and you will so treat them" * * * (Record, pp. 129, 130).

"In other words, a servant, in the absence of agreement to the contrary, has the right to look

to his employer for the furnishing of a safe place to work, and if the latter, instead of discharging that duty himself sees fit to delegate it to another servant, he does not thereby alter the measure of his own obligation'' (Record, pp. 130, 131).

The distinction between the negligence of an employee, to whom such a duty has been properly delegated, and the incompetency of such an employee, is nowhere pointed out. Defendant contends in both cases that Yokum was a fellow-servant of the Whitsett brothers, the duty of inspection falling equally on him and them.

Further charging the jury, the Court said:

“It is alleged in the case of Fred Whitsett that the defendant employed an incompetent man as missed-hole man, and that this fact contributed proximately to that plaintiff’s injury. With respect to the duty of the employer to use care in selecting his employees or officers, you will understand that while he must use due care in that regard the employer does not warrant the competency and faithfulness of any one of his employees to the others in his employ. His liability is not of so strict a nature as that. His duty in the matter of employing and retaining and watching over his employees is measured by the same rule of ordinary care and prudence above stated, and if he has selected them with discretion and omitted nothing that prudence dictates in overseeing them, and observing the character of their work, he has done all that the law requires of him. If he has failed in this duty, to the injury of his employee, then he is liable therefor’’ (Record, p. 133).

The foregoing quotations are substantially all that is said by the trial Judge, in his charge, upon the subject under consideration. Nowhere is the jury told that in the Reardon case no recovery can be had if the accident was caused by the incompetency of Yokum. That the defendant had the right to have the jury so instructed is beyond question.

See the case of

People v. Taylor, 36 Cal. 265,

and other cases cited with it in the last preceding point.

For these reasons, it is respectfully submitted that this Court correct the errors of the District Court by reversing the judgment complained of and directing a new trial herein.

Dated, San Francisco,
September 19, 1914.

C. H. WILSON,
Attorney for Plaintiff in Error.

No. 2420

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COP-
PER COMPANY (a corporation),

Plaintiff in Error,

vs.

J. E. REARDON, Administrator of the
Estate of Frank Whitsett, Deceased,

Defendant in Error.

Upon Writ of Error to the United States District Court for the Northern
District of California, Second Division.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM M. CANNON,
Attorney for Defendant in Error.

Filed

Filed this day of November, 1914.

NOV 6 - 1914

F. D. Monckton,
Clerk.

FRANK D. MONCKTON, Clerk

By Deputy Clerk.



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BRIEF FOR DEFENDANT IN ERROR.

Preliminary Statement.

In the statement of the case in the brief of plaintiff in error there are certain inaccuracies. Referring to the duties of the "missed-hole" man, Yokum, it is said that it was his duty to examine the face of the drift or cross-cut *as far down as the accumulation of muck at the bottom of the same* would permit. On this subject the evidence is con-

flicting, plaintiff's evidence showing that it was Yokum's duty to examine the whole face of the drift (Record, pp. 74, 91, 92, 116).

It is also stated that it was not Yokum's duty to examine below the pile of muck for "missed shots". On this subject, as before stated, there was a conflict, plaintiff's evidence being that it was Yokum's duty to examine the entire face of the drift after the muck had been removed (Record, pp. 74, 92, 116).

It is asserted that in the face of the cross-cut, one round of holes had been drilled and blasted, breaking the rock out to a depth of three or three and one-half feet. On this question there is a conflict, plaintiff's evidence being that the round of holes under consideration marked the beginning of the cross-cut (Record, pp. 66, 69, 72, 78, 81).

Statement of the Case.

It will be the purpose of defendant in error to state herein only such facts as are not sufficiently covered in the brief for plaintiff in error.

In the mine where the accident occurred there were about fifty faces where blasting operations were ordinarily carried on (p. 89). It was the practice to drill about a dozen holes and then explode them at the end of a shift (pp. 70, 81, 82, 75). The foreman would direct the machine man and chuck tender where to drill the holes (pp. 61,

65, 71). If a round of holes was not completed in one shift the next shift would take up the work, and so on, until the round was finished (pp. 71, 81, 82).

After the round of holes was exploded it became the duty of the "bar-down" man to bar down the loose rock in the face of the drift which had not already fallen, after which it was the duty of the muckers to remove the loose rock resulting from the blasts (pp. 65, 89, 91).

There was also provided a "missed-hole" man, whose duty it was to examine the face of the drift after the explosion of a round of holes for the purpose of discovering "missed holes", that is, unexploded charges of dynamite (pp. 61, 74, 90, 91, 110). The practice was for the "missed-hole" man to spend as much of his time as was necessary in looking for "missed holes" and to shoot them when found (p. 91). At the time of the accident Yokum was acting both as "bar-down" man and "missed-hole" man (pp. 70, 73, 84, 85).

After the removal of the muck and the examination by the "missed-hole" man, the foreman would, when convenient, set a crew at work drilling another round of holes (p. 66). No crew worked in any definite place steadily (pp. 65, 70, 82). One crew might work on one face for one shift and in another part of the mine the next shift (pp. 70, 82). Where the men worked depended altogether upon the pleasure or discretion of the foreman and shift boss (pp. 65, 71).

At the time the accident happened one Hall was the foreman and one Meyers the shift boss (p. 61). It was their practice to commence their work at opposite ends of the mine, setting the crews at work and gradually coming together near the center of the mine, thus covering the entire ground (p. 107).

On the night in question Fred Whitsett and his brother Frank were set to work drilling a round of holes for the cross-cut (pp. 79, 81). During the previous night (their first shift) they had drilled five holes (p. 72). The succeeding crew drilled several more and there were still two or three holes to be drilled when Fred and Frank went on shift again (pp. 72, 79). At that time, about two hours before the accident happened, there was a hole already started (p. 79). The foreman, Hall, assisted the boys to set up their machine and directed them to continue drilling the hole which was already begun (pp. 78, 79, 104). After some delay in getting the proper drills they commenced to follow their instructions, and, after drilling several minutes, an explosion of a "missed hole" occurred, resulting in the death of Frank and the serious injury of Fred (pp. 79, 83).

Yokum testified that he had examined this face down to the muck, which lay scattered around on the bottom of the tunnel, but made no examination after all the muck had been removed (p. 116). He was present at the face about the time the boys were

set at work and then had an opportunity to examine the whole face of the drift for "missed holes", but at that time made no examination at all (p. 116).

There was a conflict in the testimony as to whether it was the duty of the machine men and chuck-tenders to look for "missed holes" (pp. 125, 126, 127, 88). Witnesses for plaintiff in error say that it was their duty, but admit that they never gave either Frank or Fred Whitsett instructions to that effect (pp. 90, 93, 94, 125, 126, 127). The evidence for defendant in error is to the effect that the "missed-hole" man was employed for that specific purpose, and that no duty devolved on Fred or Frank to do that for which the "missed-hole" man was employed (pp. 85, 125, 126, 127).

Candles were used by the miners and "missed holes" were much easier of discovery in the upper part of the face than near the bottom of the drift (pp. 72, 92).

When the foreman set the boys at work to complete the hole already commenced he made no inspection of the face of the drift to discover "missed holes" (p. 106).

It appears, therefore, that no representative of the employer made any careful examination of this particular face for "missed holes". Yokum, the "missed-hole" man, made a casual examination of a part of the face before the removal of the muck, but although he was there after all the muck had

been removed he made no further examination. The foreman made no examination at all, but set the boys at work completing a hole already started. This work set off the unexploded blast, causing the injury and death complained of.

It is the contention of defendant in error, leaving out of consideration the question of the competency of Yokum, that there was ample evidence to show that Frank and Fred Whitsett were negligently set to work in a place where death or serious injury was almost certain to result from carrying out the employer's specific instructions.

Argument.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

There was no misconduct of counsel for defendant in error. If the president of the indemnity company which had indemnified plaintiff in error against liability for personal injuries or death had been called as a juror it would have been impossible to disqualify him unless it were shown, (1) that he was such president, and (2) that his company had indemnified the plaintiff in error against loss. In order to elicit these facts appropriate questions would have to be propounded to the juror. The questions complained of were merely for the purpose of eliciting information of that kind. Upon

objection being made by counsel for plaintiff in error the court asked Mr. Cannon, counsel for defendant in error, to state the purpose of the question. This was done solely in compliance with the court's request, and the court allowed the inquiry and at the same time instructed the jury to pay no attention to anything of that kind. There was certainly no error or misconduct here. The matter was a pertinent one to be inquired into and was handled as delicately as possible. It was not claimed at any time that the answers of the juror or statements of counsel were evidence in the case. Jurors are presumed to be men of ordinary intelligence, and it should certainly be assumed that they did not take as evidence what clearly was not evidence.

Considering the nature of the evidence the verdicts in both cases were exceedingly small. The evidence in the Fred Whitsett case would have justified a verdict for three times the amount. The verdict in the Reardon case was much less than is ordinarily given in death cases. The smallness of the verdicts clearly indicate that the jury was not influenced in any way by passion or prejudice. Notwithstanding the fact of the interest of the indemnity company, the plaintiff in error was dealt with most tenderly by the jury.

A further complete answer to the contention is that the plaintiff in error never requested the court to instruct the jury to disregard any statements of counsel on questions asked the jurors. The court

virtually instructed the jury at the time to disregard the statements as evidence and indicated its willingness to give a further instruction later. Counsel had no right to rely upon the court giving this instruction of its own motion. Counsel prepared and proposed a large number of instructions, but studiously omitted to ask an instruction on this subject. Consequently he cannot now be heard to complain.

Hodge v. Chicago etc. R. Co., 121 Fed. 48;
Frizzell v. Omaha St. R. Co., 124 Fed. 176;
Lindsey v. Testa, 200 Fed. 124;
Texas etc. Co. v. Watson, 112 Fed. 402; judg.
 aff. 190 U. S. 287.

II.

THE FOURTEENTH ASSIGNMENT OF ERROR.

It is contended that the court committed error in admitting evidence as to the financial condition of the parents of Fred and Frank Whitsett.

Under the provisions of Section 1970 of the Civil Code, the plaintiff could not maintain an action for the death of Frank Whitsett unless he showed that his parents were to some extent "dependent" upon him for support. This section provides:

"When death, whether instantaneous or otherwise, results from an injury to an employee received as aforesaid, the personal representative of such employee shall have a right of action therefor against such employer, and

may recover damages in respect thereof, for and on behalf, and for the benefit of the widow, children, *dependent parents*, and dependent brothers and sisters, in order of precedence as herein stated, but no more than one action shall be brought for such recovery."

Therefore it was necessary for defendant in error to show the dependency, to some material extent, of the parents of Frank Whitsett upon him. To do this it was shown that the parents were dependent upon Frank Whitsett and his brothers because of poverty and ill health.

Section 206 of the Civil Code provides:

"It is the duty of the father, the mother, and the children of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessities previously furnished to such parent is binding."

Aside from the moral obligation resting upon children to support their parents when reduced by poverty or ill health to dependency, the law of this State imposes a legal obligation upon them to do so. Clearly, therefore, it was proper to show such dependent condition by competent evidence. If defendant in error had not shown the condition of health and financial condition of Frank Whitsett's parents plaintiff in error would now be here contending that the judgment should be reversed because it was not shown that his parents were to any extent dependent upon him. And

he would be right in this contention because the burden rested upon the defendant in error to show all material facts necessary to a recovery.

The plaintiff in error is now here urging that it was error to permit defendant in error to prove a fact made material by the statute itself. Obviously there is no merit in such a contention.

III.

THE EVIDENCE IS SUFFICIENT TO SUPPORT THE VERDICT.

Plaintiff in error urges that its motion for nonsuit should have been granted because of alleged insufficiency of the evidence. There is absolutely nothing in this point.

It is settled beyond possible controversy that an employer is bound to use ordinary care to provide his employee with a safe place to work. Of course certain employments are inherently dangerous, and the law does not require an employer to eliminate all dangers which necessarily attend a particular employment. But the employer is required to make an employment which is necessarily dangerous a reasonably safe employment so far as that can be accomplished. It seems paradoxical, but is nevertheless true that, from the legal point of view, a place of employment may be *actually* dangerous, but *legally* safe.

It is not contended in these cases that the employer should have eliminated all danger attending

mining operations. But it is earnestly urged that the obligation rested upon the employer to use reasonable care to provide its employees with as safe a place to work as conditions would permit.

In these cases the employer had, no doubt in the interest of safety, provided a "missed-hole" man whose duty it was to examine the faces of drifts before crews were set to work to discover and shoot "missed holes". The employees knew of the employment and duties of the "missed-hole" man, and conducted themselves accordingly. The "missed-hole" man made a casual inspection of the face of the particular cross-cut in question and found no "missed hole", although "missed holes" were easily discoverable by any person looking for them. His first inspection was only partial, as the muck had not been entirely removed. Subsequently, and shortly before the accident, and when the Whitsett boys had been set at work drilling the hole which set off the unexploded blast, the "missed-hole" man, Yokum, was present, but made no inspection of the particular cross-cut which he had before left uninspected. The evidence for the plaintiff in error is itself to the effect that "missed holes" in the bottom of a drift are more difficult to discover than those in the upper part of the face. Yokum's first inspection was only of the upper part of the face, and he therefore left uninspected that part where the "missed holes" were harder to locate. It might be assumed, if any duty rested upon the miners at all, that the "missed holes" easiest of discovery

would be left to them. But certainly the "missed-hole" man should be expected to locate the obscure ones, because that was the very purpose of his employment. Therefore, it was a question for the jury to determine whether Yokum's efforts, such as they were, to discover "missed holes" on the particular face in question constituted reasonable care.

It is submitted that he was grossly negligent. The explosion is indubitable proof that the "missed hole" was there. The evidence is uncontradicted that it was comparatively easy of discovery to any one searching for it. Yokum failed to discover it. Whether his inspection was sufficiently thorough or not was, therefore, a question for the jury. The verdict means that his inspection was not that of an ordinarily prudent person, and such a finding will not be disturbed by this court.

The rule contended for by plaintiff in error has no application to these cases. It is true that where a place of employment is constantly changing through the efforts of the employee himself while performing his duties, and where the employee himself thus creates a condition of danger, the obligation of an employer to furnish a safe place to work is considerably modified. But this is not such a case. This was not the regular place of employment of the Whitsett boys. They, in common with all other employees in the mine, were set at work at different places at the discretion of the foreman. When they were put to work in a particular drift and required to drill holes in a particular face,

the employer was bound to use ordinary care to see that that particular drift or place was safe at that time. If, during the course of their work, the employees themselves made it unsafe the principle contended for might apply.

In this case the employees had absolutely no discretion as to where or how they would work. The very hole which did the damage was already started when they went to work. Hall, the foreman, assisted them in setting up their machine and directed them to continue drilling the hole which was already begun. Therefore, the general rule clearly applied, namely, that the obligation rested upon the employer to make that particular spot reasonably safe when setting men at work there. As they had been working but a few minutes when the explosion occurred, there was no opportunity for them, by changes produced by their own efforts, to make their place of employment unsafe. Under these circumstances it seems clear that the ordinary rule as to the obligation of employers applies, and that the rule contended for by plaintiff in error has no application.

Rocky Mountain Bell Telephone Co. v. Bassett, (Ninth Circuit) 178 Fed. 768;

Reid Coal Co. v. Nichols, (Tex.) 136 S. W. 847;

Corby v. Missouri & K. Tel. Co., (Mo.) 132 S. W. 712;

Allen v. Bell, (Mont.) 79 Pac. 582.

The obligation resting upon the employer to use reasonable diligence to furnish his employee with a safe place to work is non-delegable. This proposition is so well established that the citation of authorities is unnecessary. Yokum, in carrying out his duties, was the vice-principal or agent of the employer and his negligence was the negligence of the employer.

It may also be remarked that an obligation rested upon the foreman, as the representative of the employer, to provide the employees with a safe place to work; and in the absence of a sufficient inspection by Yokum, the foreman should have inspected and discovered the "missed hole". Hall admits that he set the Whitsett boys at work, but made no careful inspection of the face of the cross-cut. Both of the employer's representatives on the ground, therefore, were negligent, and it is submitted that the jury's finding of negligence should not be disturbed.

IV.

AS TO ALLEGED ERRORS NUMBERED XLIV AND XLV.

Plaintiff in error contends that the court should have instructed the jury as to the rule obtaining where the place of employment is constantly changing owing to the efforts of the employee himself. As already appears, this principle has no application in this case. The face of the cross-cut in question was not made dangerous by the Whitsett boys.

If it was made dangerous by other employees who had worked there at some indefinite time previously, the obligation rested upon the employer to make it reasonably safe before setting the Whitsett boys at work there. This the employer failed to do. The accident happened because of this failure, and not through any change in the conditions brought about by the progress of the work.

It was clearly proper for the court to refuse to instruct the jury upon a proposition of law which was not under any conception of the facts involved in the case. See, also, in this connection, the cases last above cited.

Furthermore, it is submitted that the instruction as proposed did not contain an accurate statement of the principle contended for by plaintiff in error.

V.

ALLEGED ERRORS XLIX AND LIII.

The evidence of the defendant in error as to Yokum's duties as "missed-hole" man was amply sufficient to show that he should have inspected the particular face in question before the Whitsett boys were set at work. This being so, it is well established that the employees had a right to assume that he would perform his duties in that regard. This particular question has frequently been considered in street railroad cases. In *Scott v. San Bernardino Valley*

Traction Co., 152 Cal. 604, where the relative obligations of motormen and drivers of vehicles on the street were under discussion, it was held that while the obligation rested upon the driver of vehicles to use reasonable care for their own safety, they were nevertheless entitled to assume that motormen would exercise the same degree of care for the safety of the drivers.

This is the precise question here involved. Assuming that any duty rested upon the Whitsett boys to examine the face for "missed holes", a corresponding duty rested upon the employer to do the same thing, and under the doctrine of the Scott case, the Whitsett boys were entitled to assume that the employer's duty in that regard would be performed. The instruction complained of as Error LIII was, therefore, clearly correct.

The refusal to give instruction assigned as error XLIX is plainly justifiable. This instruction ignored the duty of the employer altogether, stating in effect that if the Whitsett boys could not, by the exercise of ordinary care, have discovered the "missed hole", there could be no recovery. This instruction means that if the plaintiff in error could have discovered the "missed hole", by the exercise of reasonable diligence, it were excused if the Whitsett boys could not have discovered them. There is no necessity for argument as to the impropriety of this instruction.

VI.

AS TO ALLEGED ERROR NUMBER XLVIII.

In the case brought by Reardon as administrator the court did not submit to the jury the question of Yokum's incompetency. In its instructions it pointed out that it was only in the Fred Whitsett case that Yokum's incompetency was alleged, and it proceeded to state the law upon that subject as bearing only upon the case of Fred Whitsett. Nowhere in the court's charge was it stated or even intimated that any charge of incompetency was made against Yokum in the Reardon case. And no instructions were given to the jury on that subject in that case. The instructions were, in express terms, confined to the case of Fred Whitsett (Record, p. 133). It must be assumed that the jury followed the court's instructions and, on the subject of Yokum's incompetency, confined their attention to the Fred Whitsett case. There was, therefore, no error in refusing the instruction under discussion.

In conclusion, it is urged that the evidence shows without substantial conflict that Fred Whitsett sustained serious injuries and Frank Whitsett met his death through gross negligence on the part of plaintiff in error. In view of the evidence adduced both verdicts are exceedingly small. The court very fully, carefully and correctly instructed the jury upon every possible feature of the case. A new trial would probably result more advantageously to the defendant in error than to the plaintiff in error,

because upon such trial the strong probabilities are that the verdicts would be much larger. It would seem, therefore, that plaintiff in error might let well enough alone. However, although the verdicts are small and plaintiff in error appears to be contending against its own ultimate interest, the defendant in error, in order that this litigation may be brought to an end, urges the affirmance of the judgment appealed from even though dissatisfied with it.

Dated, San Francisco,
November 5, 1914.

Respectfully submitted,

WILLIAM M. CANNON,
Attorney for Defendant in Error.

No. 2420

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

BALAKLALA CONSOLIDATED COPPER COMPANY
(a corporation),

Plaintiff in Error,

VS.

J. E. REARDON, Administrator of the Estate
of Frank Whitsett, Deceased,

Defendant in Error.

Upon Writ of Error to the United States District Court of the
Northern District of California, Second Division.

CLOSING BRIEF FOR PLAINTIFF IN ERROR.

C. H. WILSON,

Attorney for Plaintiff in Error.

Filed this day of December, 1914.

DEC 11 1914

FRANK D. MONCKTON, Clerk

By F. D. Monckton, Deputy Clerk.

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CLOSING BRIEF FOR PLAINTIFF IN ERROR.

Herein an attempt will be made to answer only that portion of the brief of defendant in error that seems material to the issues involved in this case.

There is some difference between Mr. Cannon and myself as to the proper interpretation to be given to the evidence in certain particulars. It would seem, however, that the case must be determined on questions of law, which are not affected by this

divergence of opinion. I shall, therefore, proceed to a consideration of those legal questions.

I.

FIRST, SECOND AND THIRD ASSIGNMENTS OF ERROR.

Counsel claims that there was no misconduct on his part in bluntly telling the jury that there is indemnity insurance against the accident complained of and that the indemnifying company is making a defense through its own counsel. He cites no case as authority for his contention, but relies upon a bare supposition that the juror under examination might have been the president of the indemnifying company. The answer is that he was not. We have no such case. Until such a case is reached, it is not necessary to decide it. All of the authorities cited in the opening brief sustain the proposition that it is improper for plaintiff's counsel in cases of this character to inform the jury *in any manner* of the existence of accident insurance.

Granting, however, for the purposes of argument, that the talesman under examination was the president of an indemnifying company, we find that the

Code of Civil Procedure, Sec. 602, Subd. 3, provides that a challenge for cause may be taken where the talesman is a surety on any bond or obligation for either party. This being true, it was only necessary for counsel to show those facts, and he could have done so without violating the obvious

right of the defendant to a fair trial. By appropriate examination he could have shown that the talesman was the president of a corporation and that that corporation was a surety on a bond or obligation for defendant. He then would have been entitled to his challenge without specifying the nature of the bond or obligation. So, likewise, with perfect propriety, he could have stated to the trial Judge that the reason for his question was to ascertain whether or not the talesman, or any corporation with which he was connected, was a surety on any bond or obligation for the defendant. He would then have answered the question of the Judge properly and would not have bluntly stated to all the jurors a fact most detrimental to the interests of defendant.

The Court did not then and there instruct the jury to disregard the statement of counsel. What the Judge really said was: “*I will develop* what the fact is. * * * I will instruct the jury to pay no attention to the remark of counsel, *unless it should appear it is a pertinent fact.*” This cannot be construed into a present instruction. The Judge distinctly says that he will “develop” the matter, and if it should prove not to be pertinent, *then* he will instruct the jury to pay no attention to it. In other words, the Court promised to deal with the matter and took the burden upon his own shoulders. And by overruling the objection made by appellant’s counsel and failing in its promise, the Court laid its approval on the statement of counsel that there is indemnity insurance against this accident and that

the insurance company is defending this case, so that it went to the jury with all the force and effect of evidence.

But counsel states that a complete answer to the contention of plaintiff in error is that it did not request the Court to instruct the jury to disregard the prejudicial matter. There was no such duty on the part of the plaintiff in error. The trial Judge took the whole matter into his own hands when he stated that he would find out what the facts were and then instruct the jury. Under these circumstances, the plaintiff in error had a right to rely upon the promise of the Court and it was under no duty to propose an instruction in this connection. Besides this, many of the authorities cited in the opening brief are to the full effect that such misconduct as is here complained of cannot be cured by even an immediate instruction to the jury to disregard the occurrence. The cases cited by counsel on page eight of his brief go no further than to hold that it is the duty of any party desiring a specific instruction to propose the same to the Court. That has always been the rule, but where the Court takes a matter from counsel and promises to properly instruct the jury in connection therewith, then counsel has a right to rely on the promise and good faith of the Court.

Again, counsel says that the smallness of the verdicts in these two cases indicates that his misconduct worked no prejudice. I do not see how that follows, because it may be that but for the misconduct com-

plained of, both verdicts would have been for defendant below.

II.

THE FOURTEENTH ASSIGNMENT OF ERROR.

The word “dependent” in the statute is used in a practical, rather than a theoretical, sense. It makes no difference what the legal duty or moral obligation of the deceased toward his parents was. The real question in this case is to what extent they looked to him for actual financial support, and, consequently, what pecuniary loss they have sustained by reason of being deprived of that support through his death. This is the rule of damages in cases of this character established in this state by a long line of authority, and the Courts must hold that the Legislature did not change that rule by a rather loose use of the word “dependent”. Had it such an intention, it would have been expressed in unequivocal language. In the absence of an express legislative prohibition, judges should exercise some control over the admission of testimony, and, where it is more calculated to excite sympathy than to show what would be the value of the life of the deceased, it ought to be excluded.

III.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT.

This point does not go only to the failure of the trial Judge to grant the motion of plaintiff in error

for a nonsuit, but it goes to those other points stated in the opening brief:—to the error of the trial Judge in refusing to instruct the jury to return a verdict for the defendant below, and to its ruling on the petition for a new trial.

There can be no controversy relative to the duty of the employer to furnish his employe with a reasonably safe place to work where that place is permanent and prepared by the employer for the employe. I do not, however, understand exactly what the paradox of counsel has to do with the case. He says that “from the legal point of view, a place of employment may be *actually* dangerous, but *legally* safe.” This is evidently a wise remark. Yet, we need no paradox to tell us that all places are surrounded by dangers of one character or another. Probably, he intends to say that under persuasion of counsel, there may be a liability found by the jury in cases of this character where there is none in point of law.

This branch of this case is reduced to two questions, an affirmative answer as to either of which is fatal to the case of the defendant in error. These questions are: First, does the evidence show that the missed-shot that caused the accident and injury was so concealed that it could not have been discovered by the plaintiff in error or its employes in the exercise of ordinary care? And, Second, in view of the nature of the work in which the deceased was engaged, does the rule requiring the

employer to furnish his employe with a reasonably safe place in which to perform his work apply?

Considering these propositions in their order, it will be remembered that it is "possible for the rock to so break that it would conceal a missed-shot" (Record, p. 95). Ordinarily, there is a mound or bunch of material unbroken by the blast, which is seen at once to be a missed-hole (Record, p. 95). A missed-hole among the "lifters" is more difficult to discover than where it occurs in the upper part of the face. The lifters are commenced a little above the level and extend quite a distance below, in order to get the bottom of the drift on a level (Record, p. 75). The holes are drilled to a depth of four or five feet (Record, p. 48), and the blast breaks out the ground to a depth of three to three and one-half feet (Record, p. 74). The new face created by the blast would, consequently, be three or three and one-half feet deeper into the rock than the old face, at which the drilling was done. It is obvious that if the entire hole missed fire, there would be a mound or bunch of material unbroken by the blast and on the floor of the cross-cut, extending a distance of three or three and one-half feet from the new face of the cross-cut. This would be readily detected, and, of course, no such condition existed at the place of the accident. Whatever unexploded blast there was, was hidden behind the new face. This condition could be brought about in the following manner: If, before the blast, the fuses were not exactly timed, an adjoining lifter might first explode and break the

rock directly across, and so disjoin the missed-shot. The outer part of this disjoined shot might explode, or it might not, but, in any event, the bottom of the blast, consisting of a hole about an inch in diameter and of a depth of a foot or a foot and a half, would remain charged with unexploded dynamite. This would be below the bottom of the cross-cut and behind the new face and so concealed that it might be impossible of detection, and yet, it would have sufficient force on explosion to do all the damage here complained of.

The evidence in the case at bar shows that some such condition existed and caused the accident complained of. Plaintiff, his brother Frank, Yokum, Meyers, Hall, Lawrence Whitsett and Wall, all of them able to discover missed-shots, looked this face over and failed to discover the one causing the accident. To be sure, Yokum says that he did not *inspect* the bottom of this particular face after the muck was cleared away. He said that that was not his business (Record, p. 102). But, further, he says that half an hour before the accident he was there and helped Frank Whitsett line up the drill. That the muck had been cleaned out. That he looked at the face where the drill entered the face of the cross-cut, but did not see a missed-hole (Record, p. 103). The missed-hole must have been within a few inches of that which was being drilled. An inspection can be no more than an examination by sight and touch. This is exactly what Yokum did. He looked at and touched the face of this cross-cut at the point where

the missed-shot lay concealed, yet, he did not discover it. No one can contend that it was the duty of the plaintiff in error to tear its mine to pieces for the purpose of discovering missed-shots and so provide an absolutely safe place for its workmen to labor. Its utmost duty, as has been pointed out, was to use ordinary care, and, under the evidence, ordinary care was used. All of the evidence is to the effect that this particular missed-shot was so concealed that it could not have been discovered by the exercise of any reasonable degree of care. On this branch of the case, before defendant in error can recover, he must show: First, that there was a missed-shot. Second, that that missed-shot could have been discovered by a reasonable or ordinary inspection. And, Third, that plaintiff in error failed to make such an inspection. The second and third elements are not proven in this case.

Inasmuch as the employment of Yokum as a missed-shot detective was an unusual and extra precaution taken by the plaintiff in error to protect its men, I insist that the miners were not relieved of their duty to examine for missed-shots. If they were relieved at all, they can only be relieved to the extent of the duty of Yokum in that connection. The miners were bound to know just how far the employment of Yokum relieved them from their duty of examining for missed-shots. Greninger, foreman of the mine, says, in his cross-examination, to Mr. Cannon:

“There was a missed-hole man for each shift.
 * * * The best time to examine the face was after the muck had been removed, but the exigencies of mining sometimes required the missed-hole man to examine the face before all the muck had been removed. If the missed-hole man found a face clear in the course of his day’s work, and it was his part of the mine to look after, he examined the face for the missed-holes. If it happened that the face had muck in it, he would examine as far down as possible at that time and go on to the next place. * * * That would leave the bottom of it unexamined. As to whether or not the missed-hole man would go back after the muck was removed to further examine the same face would depend on whether he was ordered to do so or had time to cover those grounds. If he did not have time, it was the duty of the machine men to make the examination. The machine men were supposed to take that precaution for their own protection. It was his duty to examine the whole face every time he went to work” (Record, pp. 78, 79).

Regardless of their testimony in this connection, the miners were bound by these facts relative to the employment of Yokum, and, if they were in any measure relieved from the duty of making an examination for missed-shots, it was only to the extent here indicated. And if, with all of the precautions taken by the company for the protection of its miners, this particular missed-hole escaped detection, that fact in itself is not evidence of negligence, nor could the jury, from that fact alone, guess that the company was negligent in failing to discover the missed-shot in question. The burden of proof is on the plaintiff below, and the evidence must be such

that the jury can draw from it a reasonable inference that the plaintiff in error was guilty of negligence, before a case is made out. There being no such evidence in this case, it is insisted that there is a failure of proof.

Considering now the other proposition, that in view of the nature of the employment, the rule requiring the employer to furnish his employe with a reasonably safe place in which to perform his work, has no application to this case, we find that counsel admits the exception to the rule, but he asserts that this is not such case, because the employes did not have that freedom which would permit them to select the place of work; that the foreman directed them in what particular drift or cross-cut or at what particular face they were to do their drilling, and further, that they did not personally bring about the condition of danger that resulted in the accident and injury complained of.

The cases cited in the opening brief make no such exception to the application of the rule. Where the injured employe and his fellow-employes are engaged in a place of work in which the surrounding conditions are constantly changing whereby temporarily dangerous conditions arise, the employer is not bound to furnish a reasonably safe place of work. It makes no difference whether the injured employe himself brought about the dangerous conditions, or whether it was done by his fellow-employes.

Under these circumstances, it is immaterial where the Whitsett brothers worked in the mine, or whether they were able to choose their place of work. The real question is the *nature* of the employment, not who brought about the dangerous condition, or who directed the workmen. This is obvious from an examination of the facts of the various cases cited at pages 52 to 55 of the opening brief.

In

Consolidated Coal & Mining Co. v. Floyd, 51
Oh. St. 542; 25 L. R. A. 854,

Clay, the deceased, was employed at the time of his death in working a machine used in mining coal. With him at the time was a helper, Devault, who met his death by the same accident. The mine embraced a number of rooms in which cutting with the machine was done. The operation of the machine was to punch or jab the coal and so make a bearing in and under the coal for the driller, who followed and drilled holes in the face of the coal. The driller was succeeded by the filler and poster. Three sets of men were thus engaged in the room at different times and at distinct employments. One Dalton was the filler and poster. He was required to shoot down the coal, fill it into cars, prop the roof where necessary and get the room ready for Clay's machine. The machine required about two and one-half hours in each room and ten rooms were usually assigned to one machine. Clay and Devault were killed by the falling upon them of a piece of slate from the roof of the room in which they were working.

Here we have a case in which the employes did not select their place of work and in which they were moved about from room to room, as the Whitsett brothers were moved about from face to face in the mine of plaintiff in error, and in which the negligence, if any, was that of Dalton, a fellow-servant. Under these facts, the exception to the rule requiring the employer to furnish a reasonably safe place for his employe to labor, was held to apply.

In

American Bridge Co. v. Seeds, 144 Fed. 605;
11 L. R. A. (N. S.) 1042,

plaintiff below was a bridge builder and in doing the work of removing an old railroad bridge and constructing the new one, he was a member of a gang that removed the materials of the old bridge. There were several gangs in charge of several foremen, respectively, each gang having its particular work, and the parts of the work which these gangs should do were assigned to their foreman by a general superintendent. It seems that the plaintiff below was taken from his work of removing the materials of the old bridge and told to adjust a chain and tackle fall around the piece of iron that was to be hoisted, and which piece of iron on being lifted, knocked him off of the staging erected alongside of the bridge. The work was done in the presence and under the directions of the foreman. One of the contentions made on behalf of Seeds was that the bridge company should have entirely floored the staging upon which he stood in adjusting the chain

and tackle fall. As we have seen in the opening brief, under this state of facts, the bridge company was held not liable.

The facts in the case of

Anderson v. Daly Mining Co., 16 Utah 28;
50 Pac. 819,

are as follows: Plaintiff worked in defendant's mine, which employed three shifts. Blasting was being done in the bottom of the shaft, and the reports counted as each blast took place to ascertain if there were any missed-shots. The men were in charge of pushers and all were under one general foreman. The shift preceding plaintiff's went off work, leaving an unexploded shot, the explosion of which caused the injury to plaintiff. Here the missed-shot was caused by the fellow-employees of plaintiff. Plaintiff had absolutely no discretion as to where or how he would work.

In

Armour v. Hahn, 111 U. S. 313; 28 L. Ed. 440, Hahn was engaged as a carpenter in the erection of a new building. Bricklayers and other laborers were also at work upon it. Hahn, who had been working on one end of the roof, went to the other end and was there set to work by the foreman upon the cornice. This was made by inserting in the brick wall of the building at intervals of eight or nine feet and at right angles to it sticks of timber projecting about sixteen inches from the wall.

The defendant in error was instructed to place a joist sixteen or eighteen feet long and two and one-half inches wide on the outer ends of the projecting timbers. In order to do this work, plaintiff got out upon one of the projecting timbers, which tipped over, causing him to fall and suffer the injuries complained of. He had nothing to do with placing the timber that caused the accident. The Supreme Court said on these facts that:

“The obligation of a master to provide reasonably safe places and structures for his servants to work upon does not impose upon him the duty, as towards them, of keeping a building, which they are employed in erecting, in a safe condition at every moment of their work, so far as its safety depends upon the due performance of that work by them and their fellows.”

Here the case turned on the nature of the work, not on how it was done.

In

Thompson v. California Construction Co., 148
Cal. 38,

plaintiff appears to have been a common laborer. Defendant was working a rock quarry and blasting rock. The large irregular pieces of rock so obtained were loaded upon cars. It was plaintiff's duty to assist in the loading operation by attaching chains around the pieces of rock, and when not so engaged, he shoveled dirt. While chaining a rock, another one slipped down the face of the cliff upon him and injured him. A new trial was granted by the Court

below on the ground that the trial Court had erred in instructing the jury that it was the duty of the employer to furnish the employe with a reasonably safe place in which to work, etc., and on the appeal it was further contended that the trial Court had erred in denying defendant's motion for a nonsuit, and the order granting the motion for a new trial was affirmed. The rule contended for by plaintiff in error was held to apply.

Without further consideration of the cases cited in the opening brief, the foregoing are sufficient to establish that the position of counsel is not well taken. Neither are his authorities applicable.

The case of

Rocky Mountain Bell Telephone Co. v. Bassett, 178 Fed. 768,

is a case where the employer knew of the defect that caused the accident and injury, and the employe did not know of it. Besides, the Court, in passing on the case, distinctly recognizes the rule for which I contend (see p. 770).

The case of

Corby v. Missouri & K. Tel. Co. (Mo.), 132 S. W. 712,

is entirely different from that at bar. There, plaintiff was a lineman in the employ of a telephone company, and was injured by a fall caused by the breaking of a wooden pole upon which he was working. The negligence charged in the complaint is that defendant negligently ordered plaintiff to go upon

said pole when it knew, or by the exercise of ordinary care should have known, that said pole was rotten, weak and defective. It was insisted that the rule here contended for by the plaintiff in error was applicable. The Court, however, and properly, said that it was not.

There are many cases growing out of injuries to telegraph and telephone linemen resulting from the falling of poles, and they all turn on a different principle of law from that under consideration.

The case of

Reid Coal Co. v. Nichols, (Tex.) 136 S. W.
847,

was one with which the Court seemed to have great difficulty, but it finally expressly followed the Corby case.

Allen v. Bell, (Mont.) 79 Pac. 582,

is altogether different. In that case there was an express assurance by the foreman to the workmen that the blast, by which plaintiff was injured, had been exploded before plaintiff went into the mine. The rule under consideration is expressly recognized, the Court saying:

“But this rule does not justify a master in neglecting to give information known to him, etc. * * * Much less does it justify him in giving false information regarding any danger.”

I again assert that under the facts of the case at bar, the duty of the employer to furnish his employe with a safe place in which to work

was one that could be delegated; that Yokum was a fellow-servant of the Whitsett brothers; and that plaintiff in error is not liable for any failure on its part in the matter of making inspection for missed-shots. The evidence does not show that any duty rested upon the foreman to make inspections or to furnish the various employes of the mining company with a safe place in which to work. But if, for the purposes of the argument, we concede that such duty did rest on the foreman, then he, too, was a fellow-servant of the Whitsett brothers.

Poorman Silver Mines Co. v. Devling, 34 Colo. 37; 81 Pac. 252; 18 Am. Neg. Rep. 308.

IV.

AS TO ERRORS NUMBERED XLIV AND XLV.

The only answer that counsel makes to this point is a contention that the principle of law involved in the requests refused by the Court has no application to this case. Of course, that must necessarily be his contention. That is the only answer that he can make, but, in view of what has gone before, it is to be seen that the legal principle involved is applicable to this case, and that the requests should have been given to the jury.

The question of time is immaterial. If the Whitsett boys or their fellow-servants, in the progress of their work as miners, at any time rendered this place

dangerous, then the rule is applicable, and there was no duty on the part of plaintiff in error to follow in the footsteps of its employes and discover at all hazards every unexploded charge of dynamite that might be in the mine.

V.

AS TO ERRORS NUMBERED XLIX AND LIII.

Counsel does not answer the contentions of plaintiff in error on this point. All that he advances may be admitted and still the argument in the opening brief is unanswered. Under the testimony set forth on pages 49 and 50 of the opening brief, it was for the jury to determine whether or not the employment of a missed-shot man entirely relieved the Whitsett brothers from their duty to look out for and discover missed-shots. It was, therefore, error for the trial Judge to instruct the jury that if the plaintiff in error provided a missed-hole man, whose duty it was to detect missed-shots, then the Whitsett brothers had the right to rely on his inspection and assume that he had done his duty in that regard *“and would not be guilty of negligence for failing to make such inspection”* themselves. It was clearly the contention of plaintiff in error, well supported by evidence, that it was the duty of the Whitsett brothers to make such inspection, and, there being a conflict in the evidence upon that point, the question of fact was one for the jury and should have been submitted to them under appropriate instruc-

tions. It did not lie with the trial Judge to determine, as matter of law, that the failure of the Whitsett brothers to make such an inspection would not constitute contributory negligence.

Undoubtedly it must be admitted that Frank Whitsett could make as thorough and satisfactory inspection for missed-shots as Yokum. If, therefore, he could not discover the missed-shot in question because of its being concealed, then, as the charges under consideration say, the defendant below is not liable, because the defect was so concealed as to defy detection and deceive human judgment.

I cannot understand what the case of

Scott v. San Bernardino Valley Traction Co.,
152 Cal. 604,

has to do with this case. That case arose out of a collision between a street car and a buggy. It has nothing to do with the law of master and servant, nor can it determine the measure of duty owed by an employer to his employe.

VI.

AS TO ERROR NUMBERED XLVIII.

Answering this point, counsel says that: "In the case brought by Reardon, as Administrator, the Court did not submit to the jury the question of Yokum's incompetency. In its instructions,

it pointed out that it was only in the Fred Whitsett case that Yokum's incompetency was alleged, and it proceeded to state the law upon that subject as bearing only upon the case of Fred Whitsett. Nowhere in the Court's charge was it stated, or even intimated, that any charge of incompetency was made against Yokum in the Reardon case." The Court did say in its charge: "It is alleged in the case of Fred Whitsett that the defendant employed an incompetent man as missed-hole man, and that this fact contributed proximately to plaintiff's injury." (Record, p. 133.) But, nowhere in its charge did the Court reserve in the Reardon case the question of Yokum's incompetency, and nowhere in its charge did the Court limit or confine the question of Yokum's incompetency to the Fred Whitsett case. Such a limitation was asked in the proposed instruction under consideration. In all fairness, the plaintiff in error was entitled to have the same given to the jury. It was entitled to express instructions, and not instructions by inference.

Concluding his brief, counsel says, as I read his words, that the judgment in this case should be affirmed because the verdict is exceedingly small. Possibly to him the sum of thirty-five hundred dollars is of little consequence, but however that may be, the justice of the case can hardly be determined by

the size of the verdict. Justice cannot be measured by the freedom, or lack of freedom, with which a jury undertakes to do charity with the money of a corporation. On the argument, counsel suggested that this was not a proper interpretation of his closing remarks, but that we should rather construe them as expressions of concern on his part over the mistaken and misguided judgment of plaintiff in error in taking this appeal "against its own ultimate interest". If this be the true interpretation to be placed on the language of counsel, the plaintiff in error certainly appreciates his disinterested advice, yet, it cannot but ask why it should be required to pay an unjust,—an unlawful—verdict.

For these reasons, it is insisted that the points made in the opening brief in this case are controlling, and that this Court should correct the errors of the District Court by reversing the judgment here complained of.

Dated, San Francisco,
December 9, 1914.

C. H. WILSON,
Attorney for Plaintiff in Error.

